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2537
No. 11963

Exhibits in Case No. 11963
of Clerk,

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

HERBERT A. JONES, JR.,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED
AUG 26 1948

No. 11963

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.
HERBERT A. JONES, JR.,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record ing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Assistant United States Attorneys,

United States Court House,

Portland, Oregon,

For Appellant.

HICKS, DAVIS and TONGUE III,

Failing Building, Portland, Oregon,

For Appellee.

In the District Court of the United States
for the District of Oregon

No. Civ. 3916

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HERBERT A. JONES, JR.,

Defendant.

COMPLAINT

United States of America, by Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, states and declares:

1. This is a civil action brought by the United States and this Court has jurisdiction under 28 U. S. C., Section 41.

2. That during all times hereinafter named the United States Maritime Commission was and at all times has been an Agency of the United States of America, and during all times hereinafter named the War Assets Administration is an Agency of the United States of America duly established under Public Law 457 of the 78th Congress, entitled "Surplus Property Act of 1944", and that the War Assets Administration as a disposal agent was provided for in Executive Order 9689, issued by the President on January 31, 1946, and published in Federal Register.

3. That heretofore and on or about the . . . day of . . . , 1946, certain Universal Gear Joints, described as Lots No. 27, 28, 29 and 30 in Exhibit "A", hereto annexed and by this reference made a

part and parcel hereof, were, by the owning Agency, United States Maritime Commission, duly and legally declared surplus property to the War Assets Administration, which said War Assets Administration undertook to dispose of said surplus property in accordance with the aforesaid Act of Congress and the regulations and orders promulgated thereunder. [1*]

4. That thereafter and through inadvertance and mistake, the coding section of the War Assets Administration assumed that said Universal Gear Joints were automotive equipment and parts, and they were accordingly listed for disposition with the automotive section of the War Assets Administration, whereas, in truth and in fact, said equipment was designed by the manufacturer thereof as Industrial Machinery, and it was so used generally and was unsuited for and incapable of being used as automotive Universal Gears or for any other automotive purpose.

5. That it was the practice of the War Assets Administration to cause to be issued and circulated "Special Offerings" to the automotive trade and to interested veterans, who had placed their names of record, advertising any and all surplus equipment, machinery, accessories, etc., pertaining to and used in the said automotive trade, and inviting bids thereon.

6. That the said Universal Gears were, as aforesaid, together with other equipment and parts, thus

*Page numbering appearing at foot of page of original certified Transcript of Record.

advertised and circulated as aforesaid as "Special Offering, C-286", which is said Exhibit "A", attached hereto, and in which said special offering the aforesaid gears were fully and completely described; that because the same were not automotive parts or equipment, readily known by men with automotive knowledge and experience by reading the technical description thereof in the said special offering, no bids were received from veterans or from men engaged in the automotive business and trade.

7. After various items thus offered in Exhibit "A" were disposed of there remained a residue of unsold items, to-wit, the items described in Lots Nos. 1, 2, 3, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32.

8. That theretofore, and on or about the 30th day of October, 1946, defendant herein made an inquiry of an automotive salesman of the War Assets Administration, as to whether or not there were any Jeep Motors for sale at said time by the War Assets Administration. The said salesman, referring to the aforesaid residue, informed Defendant that there were available two Jeep Motors, but that to acquire same it would be necessary to purchase all of the items comprising the unsold residue of the aforesaid Exhibit "A". The Defendant, [2] thereupon, said he was not interested in acquiring anything other than the said Jeep Motors, but after considerable discussion, Defendant advised the said salesman that he would consider buying the unsold residue as aforesaid, if priced low enough; the said salesman then offered to sell all of said residual items to defendant for \$75. That Defendant offered

to buy said items at said price, and later paid said sum to the Cashier of War Assets Administration; that thereafter, Defendant took delivery of all of said items, except Lots Nos. 27, 28, 29 and 30, being the said Universal Gear Joints. That before delivery of said gears was made to Defendant, the United States Maritime Commission became aware of the gross inequitable sale and withdrew the said Universal Gears from the agency, War Assets Administration, and refused delivery of the said Universal Gears to Defendant; that, thereafter, the War Assets Administration and U. S. Maritime Commission refused delivery thereof to Defendant.

9. That the parties to the aforesaid transaction were mutually mistaken as to the nature and value of the Universal Gears, and there was an utter failure of meeting of minds in that neither plaintiff's agent nor defendant, at said time and place were familiar with the items then offered for sale and particularly were not familiar with the said gears; that they had never seen the said gears, were unfamiliar with the value thereof in that they both believed the gears were of insignificant value; that both were of the mistaken opinion that the gears were automotive parts, Whereas in truth and in fact, the said gears were Industrial Machinery and were unsuited for and incapable of being used in automobiles; and further, that said gears in fact at said time had a retail price of \$62,533.45 and that plaintiff theretofore had paid the said sum for said

gears, and that at the time of the aforesaid sale the gears had a scrap value of \$2,260.00.

10. That because of aforesaid, Plaintiff alleges that there was a total failure of meeting of minds; both Plaintiff and Defendant were mutually mistaken as to an essential fact, to-wit: the nature and value of said articles; and further to permit said sale to be consummated would result in gross inequity; [3] and plaintiff, therefore, alleges that said sale of Lots Nos. 27, 28, 29 and 30 should be vacated, set aside and rescinded, and that defendant should be reimbursed in the sum of \$69.13, the amount paid for said gears, which said amount has heretofore been tendered to defendant and by him rejected, and plaintiff therefore tenders the said sum into Court for defendant's use and benefit and plaintiff hereby consents that a decree be entered in favor of defendant and against plaintiff for said sum.

Wherefore, Plaintiff prays for a Decree of this Court to vacate, set aside and rescind the aforementioned sale of October 30, 1946, between Plaintiff and Defendant, and for its costs and disbursements herein incurred.

HENRY L. HESS,

United States Attorney for the
District of Oregon.

By /s/ VICTOR E. HARR,

Assistant United States Attorney. [4]

WAA 1101

EXHIBIT A

SURPLUS
GOVERNMENT
PROPERTY

SPECIAL OFFERING

For Sale By
WAR ASSETS
ADMINISTRATION

Portland Regional Office
P.O. Box 4062, Portland 8, Oregon

Special Offering No. C-286
4 October 1946

Regional Office Reference No.	Quantity	Description and Location	Condition or Price
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INVITATION TO BID

Sealed bids are invited for materials described on the following pages hereof. Bids will be considered for Entire Lots Only. No bids will be considered on single line items.

MATERIALS: SPARE PARTS, JEEP ENGINES, JACKS

LOCATION & INSPECTION: Contact the Surplus Property Officer at site, from 1:00 A.M. to 3:00 P.M. daily Monday through Friday. For further information contact Automotive and Machinery Sales Division, War Assets Building, Swan Island, Portland, Oregon, or phone TRinity 1121.

TIME AND PLACE OF BID OPENING: 3:00 P.M. (PST) October 24, 1946, War Assets Administration Building, Swan Island, Room 114, Portland, Oregon.

DEPOSIT: No deposit required with bid. Material listed in this offering is to be sold F.O.B. location.

SUBMISSION OF BIDS: Please use bid form attached, and mail all bids to P.O. Box 3714, Portland 8, Oregon. All bids must be signed and dated with name and address of bidder clearly shown on Bid Form. Sealed bids should be submitted in the enclosed self-addressed bid envelope with the attached Bid Form.

NOTE: Bids on Special Offering No. C-286 in order to be considered must be received in this office by 2 P.M. 24 October 1946. Any bid which is accepted will be subject to the terms and conditions on the reverse side of the Bid Form.

VETERANS OF WORLD WAR II: VETERANS MUST ENCLOSE THEIR CASE NUMBER OF FORMS 61, 63, or 73 WITH THEIR BIDS.

To help you in purchasing surplus property from the War Assets Administration, a Veterans Unit has been established in each of our Regional Offices.

Exhibit A—(Continued)

SPARE PARTS, JEEP ENGINES, JACKS—(Cont'd.)

Regional Office Reference No.	Quantity	Description and Location	Condition or Price
THIS SURPLUS PROPERTY IS BEING OFFERED TO PRIORITY CLAIMANTS INCLUDING VETERANS OF WORLD WAR II AND TO ALL OTHER BUYERS CONCURRENTLY. OFFERS TO BID WILL BE CONSIDERED IN ORDER OF THEIR PRIORITY. [5]			
		Location: Substation Warehouse Ampere, (Vancouver), Wash.	
		Inspection: Contact Custodian at location	
		Lot No. 1	
SO-C-286-1	1	Body, Dump Truck, 1½ yd. capacity, civilian type, Mfr. Isaacson, Ser. P5282299 (2411358-1-1) Used-Fair \$.....	
		Location: Warehouse No. 2 CIW Portland, Oregon	
		Inspection: Contact Custodian at location	
		Lot No. 2	
SO-C-286-2	12	Cock, Plug, Brass, 1½" lift ends, ser'd lubricated round port, straightway, trim-brass Mfr. A.C.F. SMR No. 83889 (223416-2-3) New-Good \$.....	
		Location: Motor Pool & Bldg. T-322 Fort Stevens, Ore.	
		Inspection: Contact Custodian at location	
		Lot No. 3	
SO-C-286-3	1	Engine Assembly, Jeep, Ford, 4 cyl., L head engine No. GPW-61064 SAE H.P. 15.6 actual H.P. 60, distributor cap, rotor, plug wires, & oil filter all missing. General condition fair. Tag No. 11708 (2725047-2-1) Used-Fair \$.....	
	1	Engine Assembly, Jeep, Ford, 4 cyl. L head no engine number SAE H.P. 15.6 actual H.P. 60. Pulley housing cracked & 1 bad bearing, no air filter. Tag No. 11709 (2725047-2-2) Used-Poor \$.....	
		Location: Kaiser Company, Inc. Swan Island, Portland, Oregon	
		Inspection: Contact Custodian at location	

Exhibit A—(Continued)

SPARE PARTS, JEEP ENGINES, JACKS—(Cont'd.)

Regional Office Reference No.	Quantity	Description and Location	Condition or Price
Lot No. 4			
SO-C-286-4	5	Jack, Journal, Low ht. ball bearing, screw type portable, hand operated, Cap. 35 tons. Ht. (closed) 10", rise: 5" Wt. 40 lbs. Purchased 1942 (Mar.) —New. Mfr. The Duff-Norton Mfg. Co. Model: 3510-C-1 MC 83186 (2725131-1-1)	Used-Fair \$.....
			[6]
Lot No. 5			
SO-C-286-5	81	Jack, Journal, Low ht. ball bearing, screw type portable, hand operated. Cap. 25 tons Ht. (closed) 10". rise: 5" Wt. 36 lbs. Purchased March 1942. —New. Mfr. The Duff-Norton Mfg. Co. Model: 2510-C-1 MC 83186 (2725131-1-2)	Used-Fair \$.....
Lot No. 6			
SO-C-286-6	6	Jack, Journal, Low height, ball bearing, screw type, portable, hand operated. Cap. 25 tons, Ht. (closed) 10"; rise: 5". Wt. 36 lbs. Purchased March 1942—new. Mfr. The Duff-Norton Mfg. Co. WO/Steel Handles. Unit Cost adjusted accordingly. Model 2510-C-1 (2725131-1-3)	Used-Fair \$.....
Lot No. 7			
SO-C-286-7	4	Jacks: Hydraulic, portable, hand operated. Cap. 50 tons. Dim. 9½"x10½"x12" high (closed) 5" rise. Wt. 82 lbs. Purchased: April 1942—new. Mfr. Pomeroy Engineering Co. Model 50 ton. MC 83186 (2725131-3-2)	Used-Poor \$.....

Exhibit A—(Continued)**SPARE PARTS, JEEP ENGINES, JACKS—(Cont'd.)**

Regional Office Reference No.	Quantity	Description and Location	Condition or Price
Lot No. 8			
SO-C-286-8	14	Jacks, Steamboat ratchet towing portable hand operated. Cap. 15 ton. Dim. (closed) 72", (Open) 116". 1 $\frac{3}{4}$ " dia. screw. Wt. 90 lbs. Purchased Feb. 1943—new. Mfr. Templeton Kenly & Co. Model L8-2 MC 83186 (2725131-3-1)	Used-Fair \$.....
Lot No. 9			
SO-C-286-9	96	Jacks, Push-pull, ratchet screw, portable, hand operated. Cap. 15 tons. Dim. (closed) 24" long operating length 18"; 2" dia. screw. Wt. 41 lbs. Purchased—Nov. 1942 new. Mfr. Templeton Kenly & Co. Model 1524. MC 83186 (2725131-2-5)	Used-Fair \$.....
Lot No. 10			
SO-C-286-10	5	Jacks, Push-pull, ratchet screw, portable, hand operated. Cap. 15 tons. Dim. (closed) 24" long, operating length, 18"; 2" dia. screw. Wt. 41 lbs. Purchased Nov. 1942 new. Mfr. Templeton Kenly & Co. Model 1524 W/O Steel handles. MC 83186 (2725131-2-6)	Used-Poor \$.....
Lot No. 11			
SO-C-286-11	19	Jack, Journal, low, ht. ball bearing, screw type, portable, hand operated. Cap. 15 tons. Height closed 10" rise: 5 $\frac{1}{2}$ ". Weight 30 lbs. Purchased Feb. 1942 new. Mfr. The Buda Co. Model 1510 MC 83186 (2725131-2-4)	Used-Poor \$.....
Lot No. 12			
SO-C-286-12	7	Jacks, Journal low height, ball bearing, screw type, portable, hand operated. Cap. 15 tons. Ht. (closed) 10". Rise 5 $\frac{1}{2}$ " Wt. 30 lbs. Purchased Feb. 1942 new. Mfr. The Buda Co., Model 1510 (2725131-2-3)	Used-Fair \$.....

[7]

Exhibit A—(Continued)

SPARE PARTS, JEEP ENGINES, JACKS—(Cont'd.)

Regional Office Reference No.	Quantity	Description and Location	Condition or Price
Lot No. 13			
SO-C-286-13	7	Jack, Journal, low height, ball bearing, screw type, portable, hand operated. Cap. 25 tons. Ht. (closed) 10" Rise: 5½" Wt. 36 lbs. Purchased Feb. 1942 Mfr. The Buda Co., Model 2510 MC 83186 (2725131-2-2)	Used-Poor \$.....
Lot No. 14			
SO-C-286-14	17	Jacks, Journal, low height, ball bearing, screw type, portable, hand operated. Cap. 25 tons ht. (closed) 10" rise: 5½" Wt. 36 lbs. Purchased Feb. 1942—new MC 83186 Mfr. The Buda Co. Model 2510 (2725131-2-1)	Used-Fair \$.....
Location: Columbia Metals Corp., Salem, Oregon Plancor 1864			
Inspection: Contact Custodian at location			
Lot No. 15			
SO-C-286-15	5	Jacks, Screw, Duff-Norton 25 ton., DPC 852159, 852160, 852161, 852162 & 852166 (918137-2-1)	Used-Fair \$.....
Lot No. 16			
SO-C-286-16	3	Jacks, Screw, Duff-Norton—50 ton. DPC 852144, 852147, 852149 (918137-2-3)	Used-Fair \$.....
Lot No. 17			
SO-C-286-17	6	Jacks, Screw, Duff-Norton—35 ton. DPC: 852151, 852152, 852153, 852154, 852156, 852157 (918137-2-2)	Used-Fair \$.....
[8]			
Location: Pendelton Army Air Field Hanger Bldg. Pendleton, Ore.			
Inspection: Contact Custodian at location			

Exhibit A—(Continued)

SPARE PARTS, JEEP ENGINES, JACKS—(Cont'd.)

Regional Office Reference No.	Quantity	Description and Location	Condition or Price
Lot No. 18			
SO-C-286-18	3	Jack, Airplane Tripod. Hydraulic Cap. 20,000 lbs. Min. Ht. 62" lift 18" ap- prox. type W256 Ser. 571560, 372516, 481463. Mfr. Blackhawk Mfg. Co., Stock No. 8200-401000. (918019-2-2)	Used-Fair \$.....
Lot No. 19			
SO-C-286-19	2	Jack, Tripod Airplane Nose Type Hy- draulic Cap. 20,000 lbs. Min. Ht. 66" lift 20" type W298 Ser. 375688, 575578. Mfr. Blackhawk Mfg. Co. Stk, No. 8200-421000 (918019-2-3)	Used-Fair \$.....
Lot No. 20			
SO-C-286-20	4	Jack, Tripod Airplane Hydraulic Cap. 20,000 lbs. Min. Ht. 7 ft. Lift Ap- prox. 24". Type W262 Ser. 373673, 561010, 575178, 561123, Mfr. Black- hawk Mfg. Co. Stock No. 8200- 389000. (918019-2-1)	Used-Fair \$.....
Lot No. 21			
SO-C-286-21	3	Jack, Extensions. Stk. No. 8200-243800 (918019-2-4)	Used-Fair \$.....
Lot No. 22			
SO-C-286-22	2	Jack, Airplane Tail, Hydraulic Type Solid base. w/12" extension Cap. 10- 000 lbs. Min. Ht. 34" Type AC22406 Ser. 556249 (One nameplate miss- ing). Mfr. Blackhawk Mfg. Co. Stk. No. 8200-395000 (918019-1-2)	Used-Fair \$.....

Location: Gunderson Bros. Eng. Corp.
4700 N. W. Front Ave.
Portland, Oregon

Inspection: Contact Custodian at location.

Exhibit A—(Continued)

SPARE PARTS, JEEP ENGINES, JACKS—(Cont'd.)

Regional Office Reference No.	Quantity	Description and Location	Condition or Price
Lot No. 23			
SO-C-286-23	104	King Pins for trailer hitch on 20 ton truck, Army parts No. 5231 7-5 (223728-2-1)	New-Good \$.....
			[9]
Location: Screw Mach. Products Co. 626 S. E. Stark St. Portland, Oregon			
Inspection: Contact Custodian at location			
Lot No. 24			
SO-C-286-24	3	Norgren Lubricator, Style No. 399 1b 2 (221144-1-8)	Used-Fair \$.....
Location: Kaiser Co., Inc., Vancouver, Washington			
Inspection: Contact Custodian at location			
Lot No. 25			
SO-C-286-25	3	Spare parts: For Allis Chalmers main circulating pump, each set consists of the following: (L-Rotating Element complete: 1 motor half coupling) 1-set screws: 20 $\frac{3}{4}$ "x3 $\frac{1}{4}$ " lg. studs w/nuts, 43 $\frac{3}{4}$ "x3 $\frac{1}{2}$ " lg. studs w/nuts: 1-set No. 811 packing; 6, $\frac{1}{2}$ " coupling bolts w/nuts & cotter pin. (2725019-2-2)	New-Good \$.....
Location: Oregon Shipbuilding Corp. Portland, Oregon.			
Inspection: Contact Custodian at location			
Lot No. 26			
SO-C-286-26	240	Gear: Miter. 2" P.D.—20 tooth. $\frac{3}{4}$ " bore, Hub 1 $\frac{5}{8}$ " O.D. x 1 $\frac{1}{4}$ " long. 9/16" face steel. Mfr. Boston Co., Fig. No. L-103 MC 80531 (223644-1-1)	New-Good \$.....

Exhibit A—(Continued)

SPARE PARTS, JEEP ENGINES, JACKS—(Cont'd.)

Regional Office Reference No.	Quantity	Description and Location	Condition or Price
Lot No. 27			
SO-C-286-27	199	Universal Gear Joint: Hinge type, shaft. C.I. Steel shafting. Br. Gears 1¼" shaft. Shaft connection 3" long. Operates from 0 to 92 degrees. Mfr. Piezo Electric Laboratories, Sim. to Brooks Eqpt. Corp., Model CHJ-Class B MC 80432	
		(223241-1-1)	New-Good \$.....
Lot No. 28			
SO-C-286-28	2942	Universal Gear Joint: Hinge type, shaft. Made of brz. Stl. shafting 15/16" shaft connection 3⅛" lg. Operates from 0 to 92 degrees. Mfr. Bellingham Iron Works. Sim to Brooks Eqpt. Corp. Model CHJ Class A. MC 80433	
		(223242-1-1)	New-Good \$.....
Lot No. 29			
SO-C-286-29	1655	Universal Gear Joint: hinge type, shaft. Made of brz. Steel shafting. 15/16" shaft, shafts connection 3⅛" long. Operates from 0 to 92 degrees. Mfr. United Engineering Co., Sim to Brooks Eqpt. Corp., Model CHJ Class A MC 80434	
		(223243-1-1)	New-Good \$.....
Lot No. 30			
SO-C-286-30	28	Universal Joint: Hinged, gear. M.I. Housing w/2 grease fittings. Bronze ball & socket gears. Steel shafting. ¾"x3" long. Hinge range 0 to 92 degrees. Mfr. Piezo Electric Corp., Type LJ-100 Drwg-P 176. MC 80495	
		(223837-1-1)	New-Good \$.....

[10]

Location: Camp Adair, Corvallis, Oregon
 Inspection: Contact Custodian at location

Exhibit A—(Continued)

SPARE PARTS, JEEP ENGINES, JACKS—(Cont'd.)

Regional Office Reference No.	Quantity	Description and Location	Condition or Price
Lot No. 31			
SO-C-286-31	1	Wagon, Chess, Trestle, M-1869. Military type. Mfr. Watson Wagon Co. Spec. wheels: wooden spokes and fellys. Front wheel 44" dia. w/4" steel tire. Axle 2½" sq. w/1⅞" round spindle. WB 116". Oak hounds w/ steel 5th wheel ¾"x2½"x37" dia. comp. w/front & rear bolsters, 144". Tongue w/hammer strap. Hand operated brake on rear wheels. Oak 3"x 4⅜"x161½" rls. for frame. 18" std. rear wheels 56" dia. w/4 steel tire. (2417566-1-2) Used-Poor \$.....	
Lot No. 32			
SO-C-286-32	3	Wagon, Chess, Ponton, M-1869, Military type, Mfr. Watson Wagon Co. Spec. Wheels: wooden spokes and fellys. Front wheels 44" dia. w/4" steel tire, rear wheels 56" dia. w/4" steel tire. Axle 2½" sq. w/1⅞" round spindle. WB 116". Oak hounds w/ steel 5th wheel ¾"x2½"x37" dia. Comp. w/front & rear bolsters, 144" tongue w/hammer strap, hand operated brake on rear wheels, Oak 3"x 4⅜"x16½" rails for frame. 10" standards. (2417566-1-1) Used-Poor \$.....	
Program No. P. G. 229			[11]

Exhibit A—(Continued)

WAR ASSETS ADMINISTRATION

War Assets Building
Swan Island, P.O. Box 3714
Portland 8, Oregon

BID

Date.....

In compliance with the enclosed invitation for bid, and subject to all the conditions thereof, the undersigned submits a bid of \$..... on the entire lot as listed. Mail all bids to War Assets Administration, P.O. Box 3714 Portland 8, Oregon.

(Name).....

(Street).....

(City and State).....

PLEASE ADD THIS INFORMATION

Type of Business:

Terms:

Destination ship to:

Via:

[12]

TERMS AND CONDITIONS OF SALE

War Assets Administration reserves the following rights in connection with the sale of surplus property:

- (a) To reject any and all bids and offers:
- (b) To withdraw all or any part of the property included in the sale at any time prior to a Contract of Sale; and
- (c) To reserve the right to require a deposit.

Prospective purchasers are urged to inspect property and arrangements for inspection may be made with the Regional Office of War Assets Administration.

CONDITIONS OF SALE

All property will be sold by War Assets Administration subject to the conditions described below.

The Sales Memorandum and these standard conditions of sale constitute the entire agreement between the parties with respect to the sale of the property specified in the Sales Memorandum. No variations from or modifications thereof, and no representations made or warranties given by any representative, agent, or employee of Seller in variance thereof shall be of any effect unless specified in writing and included in the Sales Memorandum. The standard conditions of sale are as follows:

- (a) Unless credit is provided for in the Sales Memorandum, payment must be made in currency, by the Purchaser's check, cashier's check, or money order prior to shipment of the property or its removal by Purchaser.

Exhibit A—(Continued)

(b) Seller makes no warranty, either express or implied, with respect to the property covered by the Sales Memorandum, except (a) Seller warrants it has the right to transfer title to the property; and (b) Seller warrants the accuracy of the description of the property, provided however, that if the property is described as new, Seller warrants only that it has not been used. Seller's liability under this paragraph shall not exceed amount of purchase price.

(c) Sales are subject to such adjustment upon the request of the Purchaser as the War Assets Administrator, or his authorized representative, in his sole discretion, may determine to be equitable under the circumstances, and any such determination shall be final. Requests for such adjustment will be considered only if filed in writing in the office of War Assets Administration responsible for the sale within fifteen (15) days (or such additional period as may be allowed in writing by the Administrator or such representative) after removal of property by Purchaser or delivery by a common carrier at the original destination.

(d) In case of error in the extension of prices, the unit price will govern.

(e) Unless otherwise specifically stated in the Sales Memorandum, all sales are made f.o.b. common carrier (cars or trucks) and shipping expenses will be paid by Purchaser. Specific shipping instructions from Purchaser must be received by the regional office of War Assets Administration responsible for the sale within ten (10) days from the date of the Sales Memorandum; or if prior to the expiration of said 10-day period Purchaser notifies Seller that he will remove the property, such removal must be effected within fifteen (15) days of the Sales Memorandum. Seller will not ship the property to more than one destination except in cases where such separate shipments each constitute a carload, truckload, or a minimum if established by WAA.

(f) If the property covered by Sales Memorandum is lost, damaged, or destroyed otherwise than by the fault or negligence of Purchaser prior to removal or shipment during the applicable period prescribed in paragraph (e) above for removal or the issuance of shipping instructions, Seller's liability shall, at election of Seller, be limited to the replacement of the property lost, damaged, or destroyed or refunding any amount paid by Purchaser therefor.

(g) If purchaser fails to issue shipping instructions or to remove the property within the applicable period prescribed in paragraph (e) above, the risk of loss, damage, or destruction of the property shall be upon Purchaser. In the event of such failure Purchaser shall, upon demand, pay to Seller reasonable storage charges if the property is stored on premises owned or controlled

Exhibit A—(Continued)

by the Government, or Seller may store the property elsewhere for the account and at the expense of Purchaser. Seller may also, upon such failure or in the event of default on the part of Purchaser in making payment or otherwise, upon giving ten (10) days written notice to Purchaser, rescind the sale, or resell the property for the account of Purchaser upon such terms and conditions as it deems proper, and Purchaser shall, upon demand, pay to Seller the amount of all losses and expenses incurred by reason of such failure or default. The exercise by Seller of one or more of the rights herein specified will not preclude Seller from exercising any other rights it may have against Purchaser.

(h) Seller shall not be liable for delay in shipping or loading the property covered by the Sales Memorandum due to causes beyond its control and without its fault or negligence, including without limitation, acts of God or the public enemy, acts or requests of any State or local governmental officer or agent purporting to act under authority, floods, fires, epidemics, quarantine restrictions, riots, sabotage, freight embargoes or failures, strikes, lock-outs, and disputes with workmen.

(i) Seller reserves the right to cancel the contract of sale without liability in cases where Purchaser is an agent acting for an undisclosed principal if such action is determined by the War Assets Administration in the public interest.

(j) No Member of, or Delegate to, Congress, or Resident Commissioner of the United States of America shall be admitted to any share or profit in the contract of sale or to any benefit that may arise therefrom unless it be made with a corporation for its general benefit.

[Endorsed]: Filed Sept. 26, 1947. [13]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and in answer to the complaint herein admits, denies and alleges as follows:

I.

Admits paragraphs I, II, III and VII.

II.

Denies paragraph IV.

III.

Admits paragraph V, except that defendant denies that it was the practice of the War Assets Administration to limit said "Special Offerings" to automotive equipment and parts or to the automotive trade.

IV.

In answer to paragraph VI, defendant admits that the Universal Joints described in said complaint, together with other equipment and parts, were advertised and circulated as "Special Offering, C-286", a copy of which is attached to said complaint, and which fully and completely described said gears, and that no bids were received for said Universal Joints, but denies each and every other allegation thereof.

V.

Admits paragraph VIII, except that the defendant denies that he said he was not interested in acquiring anything other than jeep motors, and denies that said sale was grossly inequitable and that the United States Maritime Commission did or could have withdrawn said Universal Joints from the War [14] Assets Administration after the same had been sold to defendant, as alleged in said paragraph.

VI.

Denies paragraph IX, except that defendant admits that he had not seen the particular gears in question; that at the time said gears were manufactured they had a retail price of \$62,533.45, and that at the time of the aforesaid sale said gears had a scrap value in excess of \$2,260.00.

VII.

Denies paragraph X, except that plaintiff has ten-

dered to defendant the sum of \$69.13 and that said tender has been rejected by defendant.

Wherefore, defendant prays that said complaint be dismissed and that defendant be allowed his costs and disbursements incurred herein.

HICKS, DAVIS & TONGUE,

By THOMAS H. TONGUE III,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 15, 1947. [15]

[Title of District Court and Cause.]

AMENDED COMPLAINT

United States of America, by Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for its first cause of suit alleges:

1. This is a civil action brought by the United States and this Court has jurisdiction under 28 U.S.C., Section 41.

2. That during all times hereinafter named the United States Maritime Commission was and at all times has been an Agency of the United States of America, and during all times hereinafter named the War Assets Administration is an Agency of the United States of America duly established under Public Law 457 of the 78th Congress, entitled "Surplus Property Act of 1944", and that the War Assets Administration as a disposal agent was provided for in Executive Order 9689, issued by the

President on January 31, 1946, and published in Federal Register.

3. That heretofore and on or about the.....day of, 1946, certain Universal Gear Joints, described as Lots No. 27, 28, 29 and 30 in Exhibit "A", hereto annexed and by this reference made a part and parcel hereof, were, by the owning Agency, United States Maritime Commission, duly and legally declared surplus property to the War Assets Administration, which said War Assets Administration undertook to dispose of said surplus property in accordance with the aforesaid Act of Congress and the regulations and orders promulgated thereunder. [16]

4. That thereafter and through inadvertance and mistake, the coding section of the War Assets Administration assumed that said Universal Gear Joints were automotive equipment and parts, and they were accordingly listed for disposition with the automotive section of the War Assets Administration, whereas, in truth and in fact, said equipment was designed by the manufacturer thereof as Industrial Machinery, and it was so used generally and was unsuited for and incapable of being used as automotive Universal Gears or for any other automotive purpose.

5. That it was the practice of the War Assets Administration to cause to be issued and circulated "Special Offerings" to the automotive trade and to interested veterans, who had placed their names of record, advertising any and all surplus equipment, machinery, accessories, etc., pertaining to and used

in the said automotive trade, and inviting bids thereon.

6. That the said Universal Gears were, as aforesaid, together with other equipment and parts, thus advertised and circulated as aforesaid as "Special Offering, C-286", which is said Exhibit "A", attached hereto, and in which said special offering the aforesaid gears were fully and completely described; that because the same were not automotive parts or equipment, readily known by men with automotive knowledge and experience by reading the technical description thereof in the said special offering, no bids were received from veterans or from men engaged in the automotive business and trade.

7. After various items thus offered in Exhibit "A" were disposed of there remained a residue of unsold items, to-wit, the items described in Lots Nos. 1, 2, 3, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32.

8. That theretofore, and on or about the 30th day of October, 1946, defendant herein made an inquiry of an automotive salesman of the War Assets Administration, as to whether or not there were any Jeep Motors for sale at said time by the War Assets Administration. The said salesman, referring to the aforesaid residue, informed Defendant that there were available two Jeep Motors, but that to acquire same it would be necessary to purchase all of the items comprising the unsold residue of the aforesaid Exhibit "A". The Defendant, [17] thereupon, said he was not interested in acquiring anything other than the said Jeep Motors, but after consider-

able discussion, Defendant advised the said salesman that he would consider buying the unsold residue as aforesaid, if priced low enough; the said salesman then offered to sell all of said residual items to defendant for \$75. That Defendant offered to buy said items at said price, and later paid said sum to the Cashier of War Assets Administration; that thereafter, Defendant took delivery of all of said items, except Lots Nos. 27, 28, 29 and 30, being the said Universal Gear Joints. That before delivery said said gears was made to Defendant, the United States Maritime Commisison became aware of the gross inequitable sale and withdrew the said Universal Gears from the agency, War Assets Administration, and refused delivery of the said Universal Gears to Defendant; that, thereafter, the War Assets Administration and U. S. Maritime Commission refused delivery thereof to Defendant.

9. That the parties to the aforesaid transaction were mutually mistaken as to the nature and value of the Universal Gears, and there was an utter failure of meeting of minds in that neither plaintiff's agent nor defendant, at said time and place were familiar with the items then offered for sale and particularly were not familiar with the said gears; that they had never seen the said gears, were unfamiliar with the value thereof in that they both believed the gears were of insignificant value; that both were of the mistaken opinion that the gears were automotive parts, Whereas in truth and in fact, the said gears were Industrial Machinery and were unsuited for and incapable of being used in

automobiles; and further, that said gears in fact at said time had a retail price of \$62,533.45 and that plaintiff theretofore had paid the said sum for said gears, and that at the time of the aforesaid sale the gears had a scrap value of \$2,260.00.

10. That because of aforesaid, Plaintiff alleges that there was a total failure of meeting of minds; both Plaintiff and Defendant were mutually mistaken as to an essential fact, to-wit: the nature and value of said articles; and further to permit said sale to be consummated would result in gross inequity; [18] and plaintiff, therefore, alleges that said sale of Lots Nos. 27, 28, 29 and 30 should be vacated, set aside and rescinded, and that defendant should be reimbursed in the sum of \$69.13, the amount paid for said gears, which said amount has heretofore been tendered to defendant and by him rejected, and plaintiff therefore tenders the said sum into Court for defendant's use and benefit and plaintiff hereby consents that a decree be entered in favor of defendant and against plaintiff for said sum.

Plaintiff for its second cause of suit incorporates Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 of the first cause of suit and alleges:

1. That Complaint's agent was mistaken as to basic elements of the purported sale, to-wit: the nature and value of said Universal Gear Joints at said time and place; that there was an utter failure of meeting of minds in that Plaintiff's agent, at said time and place, was unfamiliar with the items then offered for sale and particularly was not familiar

with said Universal Gear Joints; that the Plaintiff's agent mistakenly believed the Universal Gear Joints were of insignificant value; that the Plaintiff's agent was of the mistaken opinion that the gears or that the said Universal Gear Joints were automotive parts; Whereas in fact, the said Universal Gear Joints were unsuited or incapable of being used in automobiles; and further, that said Universal Gear Joints, in fact, at said time had a retail price and declared value of \$62,533.45 and that the Plaintiff theretofore had paid that sum for the said Universal Gear Joints, and that at said time of the purported sale the Universal Gear Joints had a scrap value of \$2,260.00.

2. That the Defendant at the time of the purported sale had full knowledge of the nature and value of the said Universal Gear Joints; that the Defendant knew at the time of said purported sale that the Plaintiff's agent was mistaken as to the nature and value of the said Universal Gear Joints; that the Defendant knew of the gross inequity of the purchase price of the said Universal Gear Joints; that the Defendant represented to the Plaintiff's agent that the Defendant knew that the Universal Gear Joints were practically valueless; and that the Plaintiff's agent was misled by the Defendant during the negotiations of the purported sale which would result in gross inequity [19] and hardship to the Plaintiff if the said purported sale were enforceable.

3. Plaintiff alleges that Plaintiff was mistaken as to an essential fact; that there was no meeting of the minds; that the apportioned purchase price

of the said Universal Gear Joints of the sum of \$69.13 has been tendered to the Defendant and rejected by him; that the tender of the full purchase price of said purported sale at all times would have been, and would now be, futile; and that to permit the purported sale to become consummated would result in gross inequity and hardship to the Plaintiff.

Plaintiff for its third cause of suit incorporates Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the first cause of suit and alleges:

1. That the agent or agents of the Plaintiff who dealt with the Defendant in the aforesaid transaction completing the purported sale had no authority to sell said Universal Gear Joints and that said sale was void ab initio; and that the acts of the Plaintiff's agent in making such purported sale were ultra vires and do not bind the United States of America.

Plaintiff for fourth cause of suit incorporates Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the first cause of suit and alleges:

1. That the retail price and declared value of said Universal Gear Joints were at the time of said purported sale \$62,533.45 and the scrap value was \$2,260.00; that the apportioned purchase price of said Universal Gear Joints was \$69.13; that such price was unfair and grossly inadequate; and that the Congress had delegated to no agent authority to sell said goods at such an unfair and inequitable price and that the purported sale was void ab initio.

2. That the purported sale is void in that there was no compliance by Plaintiff's agents with the

provisions of the Surplus Property Act of 1944 and that such acts of the Plaintiff's agent in making the purported sale were ultra vires and did not bind the United States of America.

Wherefore, Plaintiff prays; (1) that a decree be rendered declaring the purported sale to be void and Plaintiff to be the owner of the aforementioned property purported to have been sold to the Defendant. (2) That a Decree be rendered to vacate, set aside, and rescind the aforementioned [20] purported sale. (3) For a declaration of the rights and duties of the party hereto under and by virtue of any agreement arising under the aforementioned transactions between the Plaintiff's agent or agents and the Defendant. (4) For such other relief as the Court may seem just in the premises. (5) For cost and disbursements by Plaintiff herein.

HENRY L. HESS,

United States Attorney for the
District of Oregon

By /s/ GENE B. CONKLIN,

Assistant United States Attorney.

United States of America,

District of Oregon—ss.

Due service of the within complaint is hereby accepted at Portland, Multnomah County, Oregon, this 4th day of December, 1947, by receiving a copy thereof duly certified as such by.....of Attorneys for Herbert A. Jones, Jr.

/s/ EDWIN D. HICKS,

Of Attorneys for Herbert A. Jones, Jr.

[Endorsed]: Filed December 4, 1947. [21]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant and in answer to the amended complaint herein, admits, denies and alleges as follows:

I.

Admits paragraphs I, II, III, and VII.

II.

Denies paragraph IV.

III.

Admits paragraph V, except that defendant denies that it was the practice of the War Assets Administration to limit said "Special Offerings" to automotive equipment and parts or to the automotive trade, and alleges that said Special Offerings, and particularly Special Offering C-286, were issued and circulated, among others, to persons engaged in the purchase, sale and use of hardware, heavy equipment and machinery, and to persons engaged in the purchase and sale of metals for scrap.

IV.

In answer to paragraph VI, defendant admits that the Universal Joints described in said complaint, together with other equipment and parts, were advertised and circulated as "Special Offering C-286", a copy of which it attached to said complaint, and which fully and completely described said gears, and that no bids were received for said Universal Joints, but denies each and every other allegation thereof.

V.

Admits paragraph VIII, except that defendant denies [22] that he was told or knew that the salesman to whom he was referred was an automotive salesman; that he said he was not interested in acquiring anything other than jeep motors, and denies that said sale was grossly inequitable and that the United States Maritime Commission did or could have withdrawn said Universal Joints from the War Assets Administration after the same had been sold to the defendant, as alleged in said paragraph; and alleges that said salesman showed the defendant the description of said Universal Gear Joints, as set forth in Special Offering, C-286, informed defendant that said joints were left over from the shipbuilding program at the shipyard of the Oregon Shipbuilding Corporation in Portland, Oregon, and that it might be possible to sell the same to other shipyards still in active operation.

VI.

Denies paragraph IX, except that defendant admits that he had not seen the particular gears in question; that at the time said gears were manufactured they had a retail value of \$62,533.45, and that at the time of the aforesaid sale said gears had a scrap value in excess of \$2,260.00, but alleges that he was at that time familiar with the nature and value of the gears described in said Special Offering, and that there was no mutual mistake as alleged in said paragraph IX.

VII.

Denies paragraph X, except that at or about the

time of serving and filing the complaint herein plaintiff tendered to defendant the sum of \$69.13 and that said tender was rejected by defendant.

In answer to plaintiff's second cause of suit, defendant denies the same and each and every allegation thereof except as admitted or alleged in answer to plaintiff's first cause of suit, and alleges that both plaintiff and defendant knew of the nature and value of said Universal Gear Joints; that there was no mistake [23] of any essential fact by either party; that if there was any mistake by plaintiff's agents, such mistake was solely the result of their negligence and not otherwise; that there was no failure of meeting of the minds, and that the purchase price fixed by plaintiff and paid by defendant for said Universal Gear Joints, in proportion to the original purchase price and the scrap value of said goods, was wholly in accordance with the custom and practice theretofore established, followed and approved by said War Assets Administration and that, therefore, plaintiff is estopped from alleging that said sale would result in a gross inequity and hardship.

In answer to plaintiff's **third and fourth** causes of suit, defendant denies the same and each and every allegation thereof except as admitted or alleged in answer to plaintiff's first and second cause of suit, and expressly denies that plaintiff's agents who authorized, consummated and approved said transaction had no authority to sell said joints, and alleges that said sale was ratified and approved by plaintiff, that defendant was a bona fide purchaser

for value, and that after plaintiff, through the War Assets Administration, consummated said sale and delivered sales documents form WAA-1a to defendant, plaintiff is barred and estopped from alleging that said sale was void or ultra vires or that said sale did not otherwise comply with the provisions of said Act.

For further, separate and affirmative defense, defendant alleges that all of the facts as to the nature and value of said Universal Gear Joints were fully available to both parties at the time of said sale; that thereafter, with full knowledge of said facts, plaintiff's agents, acting with apparent and actual authority, accepted payment by defendant, issued Sales Documents purporting to transfer to defendant title to said joints and delivered to defendant all of the items covered by said sale other than said Universal Gear Joints; that at the time of said sale defendant was a bona fide purchaser of said [24] goods for a valuable consideration and without notice of any alleged mistake or lack of authority on the part of plaintiff's representatives, or of their right to rescind said sale; that upon the institution by defendant of legal proceedings to recover possession of said Universal Gear Joints, plaintiff twice moved said joints out of the State with intent to defeat the jurisdiction of the court in which said proceedings were instituted; that plaintiff took no action to rescind said sale or to restore defendant to the status quo until the filing of the complaint herein on or about September 26, 1947, at which time plaintiff offered to return to defendant the sum of \$69.13 for said Universal Gear Joints, but

has at all times and does still retain the benefit of and proceeds from the sale of all other items included in said sale of October 30, 1946, and from the sale of all other items included in Special Offering N.C. 286; that the War Assets Administration in the Portland area has established a custom and practice of disposing of surplus war commodities at a small fraction of their original cost price when unsuccessful over a period of time in selling goods at more substantial prices; that the sale of said Universal Gear Joints was wholly in accordance with said established custom and practice; that defendant has been seriously prejudiced by the long delay in withholding delivery of said joints and the attempted rescission of said sale; and that under the facts of this case plaintiff is barred and estopped from seeking to rescind the sale of said Universal Gear Joints, or from alleging lack of authority to make said sale.

Wherefore, defendant prays that plaintiff take nothing by its complaint; that the same be dismissed; that said sale be held valid and binding in all respects; that defendant be declared the owner of said Universal Gear Joints and that defendant be allowed his costs and disbursements herein.

HICKS, DAVIS AND TONGUE,
THOMAS H. TONGUE, III,
Attorneys for Defendant.

Service Accepted December 15, 1947.

/s/ GENE B. CONKLIN,
Asst. U. S. Attorney.

[Endorsed]: Filed Dec. 18, 1947. [25]

[Title of District Court and Cause.]

MEMORANDUM OPINION

Seeking to avoid the difficulties attendant on rescission of a sale of personal property, where partial delivery has been made, the plaintiff insists that this contract is severable. But it is not severable. On the contrary, it was a sale by lot, and the seller insisted that it be that way. The relief sought is, therefore, denied.

Dated February 20, 1948.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Feb. 20, 1948. [26]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cause came on regularly for trial on the 22nd day of December 1947, before the Court sitting without a jury, Henry L. Hess, United States Attorney, and Victor E. Harr and Gene B. Conklin, Assistant United States Attorneys, appearing as counsel for plaintiff and Thomas H. Tongue and Neal W. Bush appearing as counsel for defendant, and the Court having heard the testimony and having examined the evidence offered by both parties and the cause having been submitted to the Court for decision and the court, having con-

sidered written memoranda and oral arguments submitted by both parties and being advised in the premises, now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I.

On or about October 4th, 1946, the plaintiff, through the War Assets Administration, an agency of plaintiff, issued a written invitation for bids upon various items of surplus property and mailed the same to 4723 dealers, including dealers in hardware, equipment and scrap metals. No bids were submitted upon 4824 universal gear joints and various other items, all of which remained as a residue. Said War Assets Administration then issued directions that this residue be placed on sale at the best price offered; and a reasonable test of the market had been made by plaintiff before said goods were sold to defendant. [27]

II.

On or about October 30, 1946, defendant was informed by said War Assets Administration of the foregoing facts and was offered the sale of said residue for the sum of \$75. Defendant was shown by said War Assets Administration a complete and accurate description of all of the items of said residue. Both plaintiff, its agents and defendant were familiar with the nature of said items. There is no substantial evidence to establish the value of said items at the time of said sale other than that the

value of said items, and in particular of said universal gear joints, was substantial, but that the exact value of said goods was questionable and speculative, which said facts were recognized both by plaintiff, its agents and defendant and all of said negotiations, including the determination of said price and their subsequent sale, were the deliberate and intentional acts of plaintiff, its agents, and defendant, and the means of information as to the value of said goods were open alike to all of said parties.

III.

No mistake was made by either plaintiff, its agents, or defendant as to the identity, nature or value of said items, including said gear joints, nor was there any mistake that determined the conduct of either plaintiff, its agents, or defendant, nor did defendant have any knowledge or reason to know that plaintiff or its agents made any such mistake or lacked authority to make said sales. No representation or fraudulent act or inducement, either actual or constructive, was made or engaged in by defendant and defendant acted in good faith at all times. Nor is there any evidence that plaintiff or its agents were misled by defendant in any way from any act, inducement or representation by defendant and there was no concealment of facts or imposition.

IV.

On said date defendant accepted said offer and tendered and paid [28] the sum of \$75. to plaintiff, which said tender was accepted and said sale

at said price was then authorized by an agent of the War Assets Administration. Thereafter, on November 6th, 1946, a bill of sale was executed and delivered to defendant by and on behalf of said War Assets Administration purporting to transfer title of all items of personal property, including said universal gear joints, to defendant and warranting that plaintiff and its agents had the right to sell said goods to defendant. Thereafter, and continuing from November 9 to 13, 1946, plaintiff delivered to defendant all of said items other than said universal gear joints, but on November 12, 1946, refused to deliver said joints, although continuing thereafter to deliver other items to defendant.

V.

On December 28, 1946, defendant filed an action for replevin in the Circuit Court for the State of Oregon for Multnomah County against the regional director of said War Assets Administration and the custodian of said goods. Said goods were then immediately moved by plaintiff's agents to the State of Washington under the custody of a resident of Oregon and upon joining said custodian as a party defendant said goods were immediately moved again to a military reservation in the State of Washington.

VI.

On or about September 26, 1947, plaintiff filed a complaint herein seeking to rescind said sale as to said Universal Gear Joints alone on the ground of mutual mistake and upon the ground that said gears

had been withdrawn by their owning agency, but did not seek to rescind said sale as to any of the other items included therein. Said sale was not severable, but by choice of plaintiff all of said items were sold as a single lot. At the time of filing said complaint plaintiff tendered to defendant the apportioned purchase price paid for said gear joints, which said tender was rejected by defendant. On December 4, 1947, plaintiff filed an [29] amended complaint seeking to rescind said entire sale on the ground of mistake, both mutual and unilateral, and lack of authority to make such a sale. Plaintiff has not tendered the balance of the purchase price paid for said other items and it has not been shown that defendant still is in possession of said items; that it would be possible to restore the status quo or that defendant would not be prejudiced by the course of action suggested by plaintiff in its amended complaint herein.

VII.

Substantial evidence was introduced to establish that it was the custom and practice of said War Assets Administration, when goods could not or were not sold on a bid or fixed price basis for a substantial recovery, to offer said goods for sale on a negotiated basis for the best price offered. Substantial evidence was also introduced to establish that the foregoing sale was in accordance with said custom and practice.

CONCLUSIONS OF LAW

Plaintiff is not entitled to rescind said sale or to

the other relief prayed for by plaintiff herein, and the action shall be dismissed for want of equity.

Dated this 1st day of March, 1948.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

Copy Rec'd 2/24/48.

/s/ VICTOR E. HARR.

[Endorsed]: Filed March 1, 1948. [30]

In the District Court of the United States for the
District of Oregon

Civil 3916

UNITED STATES OF AMERICA,

Plaintiff,

v.

HERBERT A. JONES, JR.,

Defendant.

JUDGMENT

The above entitled cause having duly come on for trial on December 22, 1947, before the Court sitting without a jury, the parties hereto being represented by their respective attorneys of record herein, and the Court, after hearing the evidence and having considered written memoranda and oral arguments submitted by both parties, and being advised in the premises, and having made its findings of fact and conclusions of law herein; Now,

therefore, based upon said findings and conclusions, it is hereby

Ordered, adjudged and decreed that judgment be and the same is hereby entered in favor of defendant herein and plaintiff's complaint herein shall be and the same is hereby dismissed.

Dated this 4th day of March, 1948.

CLAUDE McCOLLOCH,
U. S. District Judge.

Judgment entered Mar. 4, 1948.

[Endorsed]: Filed Mar. 4, 1948. [31]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 4th day of March, 1948 in favor of the defendant and dismissing plaintiff's complaint.

Dated this 30th day of April, 1948.

HENRY L. HESS,
United States Attorney
for the District of Oregon.
/s/ GENE B. CONKLIN,
Assistant United States Attorney.

[Endorsed]: Filed April 30, 1948. [32]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
PLAINTIFF INTENDS TO RELY
ON APPEAL

The plaintiff, having taken appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit, from the Judgment rendered by the District Court of the United States for the District of Oregon, hereby designates the following points to be relied on in the prosecution of said appeal:

I.

The District Court erred in making Findings of Fact insufficient to resolve any of the issues raised in the pleadings and pre-trial order and tried.

II.

The District Court erred in making Findings of Fact which do not support its Conclusions of Law.

III.

The District Court erred in dismissing the action for want of equity.

IV.

The District Court erred in holding and concluding the plaintiff not entitled to the relief prayed for.

V.

The District Court erred in holding and concluding the plaintiff not entitled "to rescind said sale".

VI.

The District Court erred in holding and concluding, if it so held and concluded, that the transaction between the defendant and the plaintiff's [33] agents resulted in a valid sale.

VII.

The District Court erred in holding and concluding that the plaintiff was not entitled to a decree declaring the right and duties of the defendant and the plaintiff under and by virtue of any agreement arising under transactions between defendant and plaintiff's agent or agents.

VIII.

The District Court erred in holding and concluding that the plaintiff was not entitled to a declaration by the Court that the purported sale be void and the plaintiff owner of the property purportedly to have been sold.

IX.

The District Court erred in holding and concluding that the plaintiff was not entitled to a decree by the Court vacating, setting aside and rescinding the purported sale between the defendant and the plaintiff.

X.

The District Court erred in making Findings of

Fact and Conclusions of Law which do not clearly show basis for the decision.

Dated this 2nd day of June, 1948, at Portland, Oregon.

HENRY L. HESS,
United States Attorney
for the District of Oregon.

/s/ GENE B. CONKLIN,
Assistant United States Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the defendant of the foregoing Statements of Points on Which Plaintiff Intends to Rely on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 2nd day of June, 1948, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Mr. Thomas H. Tongue III, Yeon Building, Portland 4, Oregon, attorney of record for defendant.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed June 2, 1948. [34]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the District Court of the United
States for the District of Oregon:

Plaintiff, United States of America, hereby designates that portion of the record in this case to be contained in the record on appeal which is described as follows:

1. All pleadings.
2. Pre-Trial Order.
3. Transcript of proceedings of the trial.
4. Order to send all trial exhibits.
5. Memorandum of Opinion.
6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Notice of Appeal to the Circuit Court of Appeals.
9. Statement of Points on which Plaintiff Intends to Rely on Appeal.
10. This designation.

Dated this 2nd day of June, 1948, at Portland, Oregon.

HENRY L. HESS,

United States Attorney for the
District of Oregon.

/s/ GENE B. CONKLIN,

Assistant United States Attorney.

[Endorsed]: Filed June 2, 1948. [35]

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the defendant of the foregoing Designation of Contents of Record on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 2nd day of June, 1948, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid addressed to Mr. Thomas H. Tongue, III, Yeon Building, Portland 4, Oregon, attorney of record for defendant.

/s/ GENE B. CONKLIN,

Of Attorneys for Plaintiff. [36]

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard ex parte this day upon motion of plaintiff, through its attorneys, Henry L. Hess, United States Attorney for the District of Oregon, and Gene B. Conklin, Assistant United States Attorney, for an order extending time for the filing of the record on appeal and docketing the within action in the Circuit Court of Appeals, and the Court being fully advised in the premises,

It is ordered that the time for filing the within appeal and docketing the action be, and it is hereby extended to seventy days from the first date of the Notice of Appeal.

Made and entered at Portland, Oregon, this 3rd day of June, 1948.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 3, 1948. [37]

[Title of District Court and Cause.]

ORDER TRANSMITTING EXHIBITS

On motion of plaintiff and appellant herein, and good cause appearing therefor, it is hereby

Ordered that all of the exhibits in the above case be transmitted to the Circuit Court of Appeals, in connection with the appeal in this case.

Dated this 11th day of June, 1948, at Portland, Oregon.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 11, 1948. [38]

[Title of District Court and Cause.]

DOCKET ENTRIES

1947

Sept. 26	Filed Complaint.
Sept. 26	Issued summons—to marshal.
Oct. 1	Filed summons with return.
Oct. 15	Filed answer.
Nov. 3	Filed deposition of William J. Burgoyne.
Nov. 10	Entered order setting for pre-trial Nov. 24. Fee.
Nov. 24	Record of pre-trial conference & order allowing U. S. to amend complaint. McC.
Dec. 4	Filed Amended Complaint.

1947 Docket Entries—(Continued)

- Dec. 15 Entered order setting for trial on Monday Dec. 22, 1947 at 1:30 p.m. McC.
- Dec. 18 Filed praecipe, U. S. for subpoenas.
- Dec. 18 Issued subpoenas—to marshal.
- Dec. 18 Filed Depositions of Delbert F. Webb & Louis A. Zaron.
- Dec. 18 Filed Answer to Amended Complaint.
- Dec. 19 Filed Motion for subpoena duces tecum.
- Dec. 19 Filed & entered order for subpoena duces tecum. McC.
- Dec. 19 Issued subpoena duces tecum—to marshal.
- Dec. 19 Issued subpoena & 1 copy to Atty. Tongue.
- Dec. 19 Filed (3) subpoenas with returns.
- Dec. 19 Filed Subpoena Duces Tecum with return.
- Dec. 20 Filed motion for issuance of subpoena duces tecum.
- Dec. 20 Filed & entered order for issuance of subpoena duces tecum. McC.
- Dec. 22 Issued subpoenas duces tecum—to marshal.
- Dec. 22 Record of trial before court & entered order allowing deft. 3 weeks to file brief; ptff. 3 weeks to answer & order that deft. may file reply. McC.
- Dec. 23 Filed subpoena duces tecum.
- Dec. 26 Filed trial exhibits 1, 2a to d, 3a to I, 4a to I, 5, 6a to e, 9, 10, 11a to I, 12a to I, and 13 to 18.

- 1948 Docket Entries—(Continued)
- Jan. 12 Filed defendants memorandum.
- Feb. 2 Entered order allowing ptff to Feb. 6, 1948 to file brief. McC.
- Feb. 2 Filed motion & stipulation for order restoring of property.
- Feb. 2 Filed & entered order restoring of property. McC.
- Feb. 7 Filed Plaintiff's Memorandum.
- Feb. 9 Entered order granting until Friday, Feb. 13 to file Deft's. brief. McC.
- Feb. 11 Entered order setting for oral argument on Feb. 16, 1948. McC.
- Feb. 13 Filed ptff's. reply memorandum.
- Feb. 16 Record of argument on the merits & order taking under advisement. McC.
- Feb. 20 Filed memorandum opinion. McC.
- Mar. 1 Filed & entered Findings of Fact & Conclusions of Law. McC.
- Mar. 1 Record of hearing in settlement of Findings. McC.
- Mar. 4 Filed & entered judgment dismissing complaint. McC.
- Apr. 19 Filed Transcript of Proceedings Dec. 22, 1947.
- Apr. 30 Filed notice of appeal to C. C. A.
- May 3 Mailed copy of notice of appeal to Hicks, Davis & Tongue.

1948 Docket Entries—(Continued)

June 2 Filed statement of points.

June 2 Filed designation of contents of record.

June 3 Filed & entered order extending to 70
days from date 1st notice of appeal time
for filing appeal & docketing. McC.

June 11 Filed & entered order transmitting ex-
hibits.

June 11 Pre-trial order submitted. (Not signed.)

United States of America,
District of Oregon—ss.

CERTIFICATE OF CLERK

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 40 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 3916, in which the United States of America is plaintiff and appellant, and Herbert A. Jones Jr., is defendant and appellee; that the said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant, and in accordance with the rules of this court; that I have

prepared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony of proceedings in court dated December 22, 1947 and filed in this office in this cause, together with exhibits 1, 2-a, 2-b, 2-c, 2-d, 3-a, 3-b, 3-c, 3-d, 3-e, 3-f, 3-g, 3-h, 3-i, 4-a, 4-b, 4-c, 4-d, 4-e, 4-f, 4-g, 4-h, 4-i, 5, 9, 10, 11-a, 11-b, 11-c, 11-d, 11-e, 11-f, 11-g, 11-h, 11-i, 12-a, 12-b, 12-c, 12-d, 12-e, 12-f, 12-g, 13, 14, 15, 16, 17, 18, also 4 sets of gears marked exhibits 6-a, 6-b, 6-d and 6-e.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 28th day of June, 1948.

(Seal)

LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy. [40]

In the District Court of the United States
for the District of Oregon

Civ. No. 3916

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HERBERT A. JONES, JR.,

Defendant.

Portland, Oregon, Monday, December 22, 1947
1:30 o'clock p.m.

Before: Honorable Claude McColloch, Judge.

Appearances: Mr. Victor E. Harr and Mr. Gene B. Conklin, Assistant United States Attorneys, appearing on behalf of the United States of America, Plaintiff. Mr. Thomas Tongue, III, Attorney for Defendant.

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

Mr. Tongue: In this case, if your Honor please, I do not believe a pre-trial order has been actually signed as yet. I think Mr. Harr submitted a draft and I submitted certain pages to be inserted. Since then Mr. Harr has submitted to me another page to be inserted, and that is satisfactory to me, if I may hand it to the Court. [1*]

The Court: You have agreed, have you, as to the form of the order?

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

Mr. Tongue: Yes. There are only two changes which I think can be made by interlineation, if I may call the Court's attention to them. I have discussed these with Mr. Harr. On page 14, line 8, it reads: "Defendant objects to Plaintiff's Pre-Trial Exhibits 4, 5 and 7——"

The Court: Take your time. You gentlemen arrange that with the Clerk after a while and then I will sign it. Let's get along.

Mr. Harr: Under the exhibits, the girl in writing it up did not segregate between the plaintiff's and defendant's exhibit.

The Court: You arrange that with the Clerk.

Mr. Harr: We can do that.

The Court: Call your witness.

R. M. GIVENS

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. State your full name, please.

A. R. M. Givens.

Q. Whom are you employed by?

A. War Assets Administration.

Q. How long have you been with the War Assets Administration? [2]

A. Since April, 1946.

Q. In what capacity or capacities have you been employed by them?

(Testimony of R. M. Givens.)

A. Well, Chief of the Sales Assistance Division, Chief of the Organization and Methods Division, and Special Assistant to the Regional Director.

Q. It is in that capacity that you are presently engaged? A. Yes.

Q. On October 30, 1946, in what capacity were you engaged?

A. Chief of the Organization and Methods Division.

Q. In line with your work there, are you familiar in a pretty general way with the procedure as to these commodities as they are declared surplus and as they come into the organization, and the general procedure? A. Yes, I am.

Q. What is the first step, Mr. Givens, when property comes to you? How does it get to you?

A. The form known as WAA1, formerly SPB1, prepared by the owning agency, transmitted in three copies, is received in our receiving section and assigned a WAA number. A copy of the form is sent back to another agency so that they have our WAA number, and also for their help in delivering the material. Then it goes into our coding section.

Q. That is, the coding section of your division?

A. That is right. The rest of the steps take place by our [3] employees and in our office. From Coding it went to Inspection.

Q. What is the purpose of coding?

A. That is for our use in the IBM machines.

(Testimony of R. M. Givens.)

Q. They are given a code number?

A. Given code numbers. Let's see if I can remember them all—In other words, there are various numbers that are used in arranging these IBM cards for inventory.

Q. When this SPB1 comes from any agency, from any owning agency, is there anything which indicates to you the condition of the property?

A. I can't answer that, Mr. Harr. I believe it does, but I won't swear to it.

Q. Anything that indicates to you what the cost of the property was?

A. Yes, that is indicated on the SPB1. We cannot receive it without the cost on it.

Mr. Harr: At this stage, your Honor, I wish to hand the witness Government's Pre-Trial Exhibits 2-A to 2-D, inclusive.

The Court: Do you have a lot of exhibits?

Mr. Harr: We have.

The Court: Put them all in. You do not need to identify them in this matter if you have agreed on them.

Mr. Harr: There will be some objections to some of them, your Honor.

The Court: They are all going to be admitted subject to any [4] objections which may be stated on the record now or at a later time. Just consider them as all admitted.

Mr. Harr: May we have the Reporter mark them?

The Court: He can do that later. You have got your numbers now.

(Thereupon the following exhibits were received:)

EXHIBIT No. 1

Copy of Special Offering No. C-286.

EXHIBIT No. 2 (Ex. 2-A to 2-D, incl.)

Forms SPB1, Declaration of Surplus Property.

EXHIBIT No. 3 (Ex. 3-A to 3-I, incl.)

Forms WAA2a, Sales Memoranda.

EXHIBIT No. 4 (Ex. 4-A to 4-I, incl.)

Forms WAA4a.

EXHIBIT No. 5

Bulletin No. 80, dated September 23, 1946, entitled "Daily W.A.A. Bulletin."

EXHIBIT No. 6 (Ex. 6-A to 6-D, incl.)

Universal Gear Joints.

EXHIBIT No. 7

Form SPB1.1, Withdrawal Form.

EXHIBIT No. 8

Forms WAA2a, other items included in Special Offering No. C-286.

EXHIBIT No. 9

Form 1121, Mailing Card. [5]

EXHIBIT No. 10

Receipt.

EXHIBIT No. 11 (Ex. 11-A to 11-I, incl.)

Forms WAA1a, for all items sold to defendant.

EXHIBIT No. 12

Pleadings in Circuit Court, Multnomah County, Case No. 174225, Jones v. Mudge, et al.

(Testimony of R. M. Givens.)

EXHIBIT No. 13

Depositions of C. T. Mudge, D. M. Gibson and S. M. Buffett in Case No. 174225.

EXHIBIT No. 14

[Deposition of William J. Burgoyne, set out in full page 183 of this Transcript of Record.]

EXHIBIT No. 15

[Depositions of Delbert W. Webb and Louis A. Zanon, set out in full, page 211 of this Transcript of Record.]

EXHIBIT No. 16

Memorandum dated March 13, 1947, to S. M. Buffett.

EXHIBIT No. 17

Shipping Notice dated March 13, 1947.

EXHIBIT No. 18

Letter dated December 4, 1946, C. T. Mudge to Neal W. Bush.

EXHIBIT No. 19

Universal Joint—Sample of automotive joint.

EXHIBIT No. 20

Three roller bearings.

Mr. Harr: Will you hand these to the witness, please?

(Exhibits No. 2-A to No. 2-D, inclusive, shown to the witness.)

Q. Examine those exhibits, Mr. Givens. Are those documents part of your official files?

A. They are.

(Testimony of R. M. Givens.)

Q. Did they come to your department in the regular course of [6] business?

A. That is right.

Q. In examining those, does that state the cost price? A. Yes, sir.

Q. Will you refer, first, to the exhibit number and the form number, and state in the record the cost price of each of those items? A. Yes.

Q. And what they cover?

A. Exhibit 2-A, the declaration, covers 28 universal joints at an acquired value of \$385.00.

Exhibit 2-B covers 199 universal gear joints with an acquisition value of \$4,686.45.

Exhibit 2-C covers 1,655 universal gear joints, acquisition cost \$20,687.50.

Exhibit 2-D covers 2,442 universal gear joints with an acquisition cost of \$36,775.00.

Q. I will ask you whether or not the acquisition cost is the declared cost? A. That is right.

Q. After that has gone to the coding section, as you state, what is the next step?

A. It then goes to the Inspection Section. They send an inspector out to verify the amount, the condition, the general condition of the material, and anything pertaining to it. He [7] prepares his report, and then that goes to our WAA4 preparation section where our inventory record was made.

Q. I will hand you Exhibits No. 4-A to No. 4-I, inclusive. Are those the forms you speak of that are prepared at that juncture?

(Testimony of R. M. Givens.)

A. That is right.

Q. I will ask you whether or not the Forms WAA4a state the condition of the merchandise?

A. Yes, they do, sir. They show the condition under the code number.

Q. Are you familiar with the code number?

A. I am sorry, sir. The condition shown on this is the code that was used at that time. It has been changed since then, and I don't remember it.

Q. All right. What is the next step in the procedure?

A. After the Forms WAA4 were prepared, they were sent to the Pricing Section for prices and then to the commodity divisions for normal disposal procedure, to program for disposal by the various means prescribed to us.

Q. Who programs certain commodities to a certain section of War Assets Administration?

A. If you mean the distribution of these forms, they were distributed to the various commodity groups, in accordance with the code that appears on the form WAA4.

Q. Who puts that on the Form 4 that would designate the disposal branch or the disposal agency? [8]

A. That is done in the Coding Section.

Q. With reference to the WAA4s that you have in your possession, do they indicate that those items as listed there were assigned to the Automotive and Construction Machinery Division?

(Testimony of R. M. Givens.)

A. To the best of my knowledge, yes. Those codes are the ones that would have gone to Automotive.

Q. Being there in the Automotive and Construction Machinery Division, what is the next step that the Division would take?

A. The people in that division would assemble a group of those and arrange what we call a program for disposal. In this case I believe there were—They were prepared and put in the program which was subsequently advertised calling for bids for this material.

Q. In this instance, Special Offering No. C-286, I believe. Is that correct? A. That is right.

Q. Following that, after the Advertising Section prepares the sales brochures, they are distributed to potential purchasers, I believe?

A. That is right. We have a regular mailing list and the brochure is mailed out to that list.

Q. Normally speaking, is it not a fact that they would circularize the materials on a fixed-price basis first and then, if there were no takers, then they would sell the materials on a bid basis, is that correct? [9]

A. That is right. Under certain conditions it may be advertised on a sealed-bid basis.

Q. If there are no bidders at the fixed price or by sealed bids, then the next normal procedure would be to offer them on a negotiated basis, is that correct? A. Yes.

(Testimony of R. M. Givens.)

Q. You are familiar, are you not, with the bulletins put out called the "Daily W.A.A. Bulletin?"

A. Yes, sir.

Q. I will hand you Exhibit No. 5 and ask you to refer to that and state whether or not in that bulletin are designated the limits of authority of the various officers of the Sales Division.

Mr. Tongue: If your Honor please, do you want me to state my objections at this time?

The Court: I am going to hear whatever evidence either side has to offer.

Mr. Tongue: I understand, then, at some time we will have an opportunity to state our objections into the record?

The Court: Oh, yes, of course.

Mr. Harr: Q. Referring to that document, Exhibit No. 5, will you state the portion of it applicable to the delegation of authority to the various officers?

A. Section 2 of WAA Daily Bulletin No. 80 indicates the limitations within which the Regional Director may delegate authority for various personnel to approve sales contracts. [10]

Q. Does it state the maximum amount of sales that can be made, as to the declared value?

A. Yes, it does.

Q. What are the maximums?

A. The Regional Deputy Director may approve sales up to \$500,000.

Q. Up to \$500,000 of the declared cost?

(Testimony of R. M. Givens.)

A. Acquisition cost. Chief of the Sales Division, up to \$100,000.

Q. Who is the Chief of the Sales Division? Is that involved in this case?

A. Well, at that time, Mr. Zanon was Chief of the Metal Sales Division. I believe Mr. Burgoyne was Chief of the Automotive and Construction Machinery Division. I may be wrong on that one. I am not sure.

Q. Just continue on, and then I will ask you another question.

A. The chiefs of the commodity branches could approve up to \$50,000.

Q. Is that what Mr. Burgoyne would be at that time?

A. May I interject here? These were the maximums that the Regional Director could authorize. Whether he actually authorized them in those amounts or not was up to him. I believe a letter was written to Mr. Burgoyne on October, I believe, 21st, 1947, which gave him authorization in the amount of \$50,000.

Q. Is that what is provided in that regulation?

A. That is right. In this regulation it goes on to provide that salesmen may approve up to \$5,000.

Q. \$5,000 of declared value?

A. That is right.

Q. Can you tell us what Mr. Zanon's authority was?

(Testimony of R. M. Givens.)

A. Mr. Zanon had authority up to \$100,000, dated October 2, 1946.

Q. And Mr. Burgoyne?

A. \$50,000, authorization dated October 21.

Q. 1946? A. That is right.

Q. And Mr. Peterson?

A. Mr. Peterson had no authorization.

Q. Mr. Williams?

A. F. C. Williams had authority to approve up to \$100,000, dated October 2nd.

Q. Mr. Webb?

A. Mr. Webb had no authorization.

Q. With reference to the procedure of the issuance of WAA2—What is the purpose of the WAA2?

A. WAA2 is the document on which sales are made. It is made in three parts. The original goes to the customer; the second copy, I believe, the green one, goes to the cashier and—No, excuse me. There are white, green and pink copies. Let me identify them that way. The white is the original, and is ultimately attached to this copy of WAA1, which is the formal sales document; the green copy goes to the cashier; and the [12] pink copy, to the customer.

Q. Is there any copy of that that goes to the owning agency? A. No, there is not.

Q. Following the issuance of the WAA2, there is a WAA1 made up?

(Testimony of R. M. Givens.)

A. That is right. The white copy of that goes to the billing unit for preparation of the WAA1.

Q. A copy of the original of this WAA1 goes to the customer?

A. The original goes to the customer.

Q. And a copy to the disposal agency—I mean, the owning agency?

A. A copy of the WAA1 goes to the owning agency, that is right.

Q. That is their notification of the sale of that particular commodity? A. That is right.

Q. And, based on that, then, delivery is, in the normal course of events, made?

A. That is right.

Mr. Harr: You may inquire.

Cross-Examination

By Mr. Tongue:

Q. Referring to Exhibit No. 2, the Declaration of Surplus, can you tell me who filled in the red pencil figures on those forms?

A. That was done in the Coding Section, Mr. Tongue, but I can't tell you which one of the coders did that. [13]

Q. That was done, then, after the forms reached the War Assets Administration?

A. That is right.

Q. What does the figure 31.81 stand for on those forms, if you know?

A. I believe you are referring to the Standard Commodity Classification Code.

(Testimony of R. M. Givens.)

Q. That may be.

A. At this time we were using up to eight digits, I believe, in the SPB1.

Q. Do you know what that stands for?

A. I would have to have a copy of the code book here to tell you.

Mr. Tongue: May I approach the witness?

The Court: Yes.

Mr. Tongue: Q. Referring to Exhibit No. 4, the Form WAA4, can you tell me who wrote in the figure \$2.50 in ink on those forms that relate to the universal gear joint?

A. I can't tell you. That was presumably done in Pricing. That is where it should have been done.

Q. After the document was typed, presumably?

A. Yes. After this document was typed, it then went to Pricing.

Q. You don't know when that was done, then?

A. You mean what date?

Q. When the figure was written in? [14]

A. It would be done in Pricing. I presume we would have the register out there. They could look up the date, if that is what you want.

Q. Now, referring to the form that relates to the miter gears, you see there that the figure \$1 is typed in there. Would that presumably be done when that form was typed originally?

A. The only explanation would be this: It was in August, I believe, Washington directed the installation of a WAA4 system. Some of this ma-

(Testimony of R. M. Givens.)

terial had been in inventory previous to that for anywhere from six months to a year, so as to anything that was typed up in the WAA4 section that had prices on it, the prices are typed in here when they typed the rest of the form.

Q. Referring to Exhibit No. 4, relating to the Jeep automobile, do you notice that the figure \$450 has been crossed out? Do you know who did that or when that was done?

A. My answer would be pure guesswork. Do you want it?

Q. I want to know if you know when it was crossed out?

A. I don't know when that was crossed out, no.

Mr. Tongue: No further questions.

Redirect Examination

By Mr. Harr:

Q. Do you know who could have put those figures on there?

Mr. Tongue: Not who could have, but I want an answer to my question. Do you know?

A. No, sir. [15]

Mr. Harr: Q. Well, do you know whether or not the Pricing Section sometimes puts that in there?

Mr. Tongue: I do not want "sometimes." I would like to have the answer limited to what he knows of his own knowledge, Mr. Harr, if I can, please.

(Testimony of R. M. Givens.)

Mr. Harr: That is what I am asking him, if he knows of his own knowledge.

A. The Pricing Section would write the figures in longhand and the WAA4 section would have typed them in by machine.

Mr. Harr: I think that is all.

Recross-Examination

By Mr. Tongue:

Q. Do you know if that was done in this case, in that way? A. Which?

Q. By the way you have just testified, in response to the question by Mr. Harr.

A. Mr. Tongue, I can't answer that question. We have, I don't know how many, thousands of documents out there. I don't know what happens to each one of them.

Mr. Tongue: That is all.

(Witness excused.) [16]

DELBERT F. WEBB

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. Your name? A. Delbert F. Webb.

Q. You are employed by the War Assets Administration? A. Yes.

Q. What is your present occupation?

(Testimony of Delbert F. Webb.)

A. Assistant Sales Manager.

Q. Were you connected, October 30, 1946, with War Assets Administration? A. Yes.

Q. In what capacity?

A. As clerk-typist.

Q. On about the 30th of October, did you meet the defendant, Mr. Jones?

A. I don't know if that is the exact date, but around October I did.

Q. State the circumstances under which you met Mr. Jones, under which Mr. Jones came to you?

A. At that time we had a receptionist at the desk and it was her practice to call us when a customer came to call on us, asking if we were available, and would answer questions. [17]

At this time she called Mr. Burgoyne and he was on the telephone and Mr. Peterson was busy, so she asked me if I would take care of it and I said I would, I would try to give him the information he needed or desired.

Mr. Jones came in and sat down and was inquiring about Jeep engines, and at that time the only engines we had that were available for sale were then among the residue of this sale, C-286.

Q. I will hand you Exhibit No. 1, which is Special Offering C-286, and I will ask you whether or not you referred to that particular offering at the time Mr. Jones and you had your discussion?

A. Yes, I referred to this.

Q. I will ask you whether or not at that time

(Testimony of Delbert F. Webb.)

some of these items listed in Special Offering C-286 had been disposed of?

A. Some of them, yes.

Q. And there was a residue—— A. Yes.

Q. ——as to certain items? A. Yes.

Q. Among which were two Jeep motors?

A. Yes.

Q. And the universal gears here involved?

A. Yes.

Q. Together with some other miscellaneous items? [18] A. That is right.

Q. At the time he came to you, what was his inquiry about? A. About the Jeep engines.

Q. What did you tell him?

A. I told him we had two Jeep engines, the residue from a sale that we had just closed, and that he might be able to obtain those, and that I was not a salesman but was merely trying to pass out information to those desiring information about obtaining surplus property.

Q. What did you tell him about the residue?

A. I told him in order to get the Jeep engines he might have to purchase all the residue that was listed.

Q. Did you tell him what that residue was?

A. I do not believe I came right out and told him. I ran my finger down the residue.

Q. You had the list at that time in front of you? A. That is right.

(Testimony of Delbert F. Webb.)

Q. A similar list to what you have in your hand? A. That is right.

Q. You ran your finger down this list?

A. That is right.

Q. In calling his attention to what was left, is that right? A. Yes.

Q. What was the discussion?

A. The main thing was Jeep engines, that he would like to buy [19] them but, since I said he might have to purchase all the residue, he did not think he would desire to buy all the other junk that went with it.

Q. I will ask you: What was his statement at that time? Can you put it in exact language, as well as you remember it?

A. Not the exact language, no.

Q. Well, what did he say?

A. That is about what he said.

Q. That he did not want to buy a bunch of junk, is that it?

A. In order to obtain the Jeep engines.

Q. Was there any conversation at that time with him that indicated that he knew what these gears were? A. No, sir.

Q. He didn't say he knew anything about the value of any of these or what these gears were used for? A. No.

Q. Did you know? A. No.

Q. What did it mean to you when you saw "universal gears?"

(Testimony of Delbert F. Webb.)

A. Meant to me, since they were in the Automotive Division, that they were automotive gears universal gears.

Q. He told you he did not want to buy a bunch of junk? A. That is right.

Q. What further conversation did you have about prices, and so forth? [20]

A. About what?

Q. About the price, and any other conversation as you can recall it?

A. The chess wagons came into the conversation, as to what they were. I told him I didn't know—I told him about what I thought they were and where they were located, and about the, I think it was, miter gears, where they were located

Q. Did he ever tell you that he worked previously for the Commercial Iron Works?

A. At that time?

Q. Yes. A. No.

Q. Did he tell you he was thoroughly familiar with these items, having worked at the shipyards?

A. No, sir.

Q. Did he tell you what they were or what they were to be used for? A. No, sir.

Q. The only conversation that you had was that they were junk?

A. That I can remember, yes, sir.

Q. All right. Did he ask you how much money you wanted for them, I mean for the residue, in-

(Testimony of Delbert F. Webb.)

cluding these two Jeep motors, or how did that come up as to price?

A. I couldn't swear on that. I can't remember. I couldn't answer as to that. [21]

Q. Did he tell you that they would be sold for \$75.00? A. No.

Q. How did that come about?

A. I referred Mr. Jones to Mr. Burgoyne. I mean Mr. Burgoyne was the authorized salesman, that I was a typist, and that he would have to obtain them from him if he was going to obtain them, and that is about the extent of the conversation.

Q. You don't know where the figure \$75.00 came into the discussion?

A. It came in, yes, but I can't put my finger on it. I think he either asked me what they would be and I told him approximately —I think I went to Mr. Burgoyne, I believe, and asked him what he would accept for them. Mr. Jones, I believe, asked him if he would accept \$75.00, and then I went to Mr. Burgoyne and asked if the acceptance of that sum would be made, and then I left it to Mr. Burgoyne.

Q. Did Mr. Burgoyne indicate to you that would be acceptable? A. Yes.

Q. You had no authority to sell, is that right?

A. That is right.

Q. And Mr. Burgoyne completed the sale, is that it? A. Yes, sir.

(Testimony of Delbert F. Webb.)

Q. Did you later have a conversation with Mr. Jones? Did you talk to Mr. Jones later?

A. No. I was instructed to phone to him, but his mother [22] answered the phone. I think it was on a Friday. His mother answered and said he was taking delivery of some materials that he had purchased.

Q. Did you later transmit any information to Mr. Jones or to his mother of the fact that delivery would be refused on the gears?

A. No, only that there was legality involved.

Q. Legality involved? Illegality involved?

A. Illegality, yes.

Q. You did not notify Mr. Jones personally of that?

A. No.

Q. Do you know who did?

A. I imagine—No, I don't.

Mr. Harr: You may inquire.

Cross-Examination

By Mr. Tongue:

Q. You testified that there was a residue left after this Special Offering C-286, which is designated as Exhibit No. 1, was issued, is that right?

A. That residue was left after that offering was closed?

Q. Yes. A. Yes.

Q. Were any bids received after that offering on these goods?

A. Not that I can remember, no. [23]

Q. How long was that residue on hand after the

(Testimony of Delbert F. Webb.)

offering was closed, before Mr. Jones came down to talk with you?

A. Approximately three days or four days.

Q. Do you know of your own knowledge that that residue had not been on hand longer than that, prior to October 30, 1946?

Mr. Harr: Your Honor, the exhibit speaks for itself. I believe upon reference it will show the last bid was October 22nd, and bids were received I believe on October 22nd, and there would be that interim between that date and the date of sale.

Mr. Tongue: Thank you, Counsel.

Q. Do you know whether anyone came to inquire concerning that residue during that interim?

A. Came to me?

Q. Came to you or to someone else out there, to your knowledge? A. No.

Q. What do you mean by "No," that you don't know, or that no one came there?

A. I don't know of anyone that came, myself.

Q. Did you try to interest anyone in that residue? A. No.

Q. Did any other salesman try to do that, to your knowledge? A. Not that I know of.

Q. Was it the customary practice for salesmen at the War Assets Administration, when people came in to inquire about certain [24] goods, to try to interest them in other goods that might be available there?

(Testimony of Delbert F. Webb.)

A. Since I was not a salesman at that time, I would not be able to answer that.

Mr. Harr: I object to that, your Honor, as to whether it was the custom or not.

Mr. Tongue: Q. Did scrap dealers often call in to see if there were any items on hand that they might be interested in?

A. At that time I would not have known that, either.

Q. Did Mr. Williams decide that this residue should be offered for sale at the best price that could be procured?

A. Yes, I overheard him say so.

Q. Who is Mr. Williams?

A. Mr. Williams, I believe, at that time was chief of the awards branch or division.

Q. Do you know whether that residue was originally offered for somewhere between \$900 and \$1,000? A. No, I don't.

Q. Do you know whether it was later reduced to around \$250? A. After close of the sale?

Q. No, after no bids had been received and it was decided to put it up for negotiated sale?

A. At approximately \$200.

Q. Then you say it was later reduced to \$75.00?

A. That is right. [25]

Q. You say you showed Mr. Jones this Special Offering with a description of the goods?

A. That is right.

Q. When he came to you? A. Yes.

(Testimony of Delbert F. Webb.)

Q. Was there any discussion, specific discussion, of the universal joints at that time?

A. No, sir.

Q. That you remember? A. No, sir.

Q. Did you know that Mr. Jones worked at the Commercial Iron Works, the shipyard, at that time?

A. I didn't know whether he had worked at the Commercial, no.

Q. Did you know at that time that he had worked at any shipyard? A. I believe so, yes.

Q. In referring to "the other junk," was there any discussion as to what he meant when he referred to it as junk?

A. As far as my interpretation of it was, he was referring mainly to these chess wagons.

Q. Did you have any reason to doubt his good faith at that time? A. No, sir.

Q. You say you took Mr. Jones to see Mr. Burgoyne, is that right? A. That is right.

Q. And that final sale was consummated by Mr. Burgoyne? [26] A. Correct.

Q. Did you have anything further to do with the transaction?

A. Only to instruct the typist to type up the document.

Q. Are you referring to the forms?

A. WAA2.

Q. WAA2? A. Yes.

Q. Introduced here as Exhibit No. 3?

(Testimony of Delbert F. Webb.)

A. Yes.

Q. In typing these forms, WAA2, in filling out the space entitled "Types," after the space indicating the program, which in this case was filled out as C-286, I assume that "C-286" referred to the Special Offering numbered C-286?

A. That is right.

Q. What did you do when you filled in the next space indicating the type?

A. Since I did not type it up——

Q. What instructions did you give to your typist?

A. I gave her a copy of the WAA4 and asked her to type up a sales WAA2 document.

Q. Would that refer back to the type of program of the original special offering?

A. If it is put in the WAA2, it actually refers back to the type of program, yes.

Q. What does the designation "0-4" mean with reference to the [27] type of sale?

A. At Mr. Givens' suggestion; the coding was different at that time, and I can't remember what the code is at this time.

Q. When you instructed that the word "bid" be stricken, you were referring back to the original type of the special offering or program, is that right?

A. I didn't make any instructions.

Q. Was that the custom and practice?

A. Yes, if there was a bid, to put in the type or method or——

(Testimony of Delbert F. Webb.)

Q. Would that be true even though particular goods were sold as a part of the residue remaining, after no bids had been received?

A. At that time I didn't know what would be put into that sales document other than the original program.

Q. You say later that you called Mr. Jones. Did you talk to Mr. Jones personally at that time?

A. At the time I phoned him?

Q. Yes. A. No.

Q. Whom did you talk to?

A. His mother.

Q. As I understand it, you told her the gear joints should be returned, is that right?

A. No, sir. I said that there was illegality involved in his sale.

Q. Of the gear joints? [28]

A. No. I didn't mention gear joints. I said we would like to have him come in the following Monday, if it was possible.

Q. Did he come in the following Monday?

A. I don't remember whether it was Monday or Tuesday or Wednesday, but he came in and saw Mr. Burgoyne.

Q. Did you ever hear of a sale canceled for error made in the preparation of the WAA4 document?

A. I will have to think about it. I can't answer that question. I can't remember of any sale being canceled because of faulty documentation.

(Testimony of Delbert F. Webb.)

Q. Do you know of any sale that was canceled because of any error by the War Assets Administration after the sales document had been made out and delivered to the purchaser?

Mr. Harr: Objected to, your Honor, as immaterial as to whether or not any other sale was canceled.

The Court: Sustained.

Mr. Tongue: Your Honor, I submit I think we should have some latitude to show what the custom and practice was at the time that this sale was consummated. As far as we know, this is the only customer as to whom the War Assets Administration ever tried to cancel or rescind any sale for any error of this type or any other type. We will show in all other instances the sales were approved and went through. Do I understand your Honor to mean that we will not be allowed to produce evidence as to practice, as to any other sales? [29]

The Court: That is right.

Mr. Tongue: And whether any other sales were made at similar proportions of the selling prices to the original cost to the Government.

The Court: I don't understand that. You will have to explain that later, when we get to it.

Mr. Tongue: What I mean is simply this, your Honor——

The Court: I say, you can explain that later when we get to it.

Mr. Tongue: Very well.

(Testimony of Delbert F. Webb.)

The Court: That is not allowable to show as against the Government. That has been ruled on many times. It is not allowable to show that the Government made some mistake at some other time.

Mr. Tongue: Very well. May I put it on this basis, your Honor?

Q. Mr. Webb, what was the custom and practice of the War Assets Administration in disposing of residue of surplus commodities that remained after they had been offered for bids and after no bids had been received?

A. At that time Mr. Peterson was my cohort and helper. He usually put them on a new bid.

Q. Put them on a new bid?

A. To re-bid the items that did not sell.

Q. Were there any respect in which this sale did not conform [30] with the custom and practice established at that time by the War Assets Administration? Do you know?

Mr. Harr: Objected to, your Honor. I think it is going far afield. I think the Government is not bound by custom and practice.

The Court: He may answer.

A. Please state it again.

The Court: Go ahead and answer the best you can. What was the custom and practice?

(Question read.)

A. None, to my knowledge, no.

Mr. Tongue: That is all.

Redirect Examination

By Mr. Harr:

Q. I hand you Exhibits 3-A to 3-I, inclusive,

(Testimony of Delbert F. Webb.)

and ask you to refer to the portion marked "disposal Type Method." I notice there is typewritten the word "Ordinary" as it pertains to this particular sale. Is that correct? A. Yes.

Q. I beg your pardon? A. That is right.

Q. Ordinarily, is it not true you would type in there the type of transaction it was, whether it was a fixed price, a bid or what?

Mr. Tongue: Just a moment. I object. [31]

Mr. Harr: Let me complete it.

Q. Or a negotiated sale?

Mr. Tongue: Objected to as a leading question, your Honor.

The Court: Answer.

A. Yes, if it was fixed, it would be "fixed"; if it was a bid, it would be "bid"; if it was negotiated, it would be "negotiated" under the type.

Q. I will ask you whether or not this was a negotiated sale? A. Theoretically, yes.

Q. What do you mean, "theoretically?"

A. Well, with the knowledge that I had at that time, since I was merely an—was merely employed by the War Assets Administration, under my impression it was a negotiated sale; as to the documents, it shows as a bid.

Q. Who made these documents?

A. The clerk-typist, the girl stenographer.

Q. Under your direction?

A. Under my direction.

(Testimony of Delbert F. Webb.)

Q. But you were new at the business at that time? A. Yes.

Mr. Harr: I think that is all.

Recross-Examination

By Mr. Tongue:

Q. Didn't you testify on my cross-examination that when the type of program was filled in that referred back to the original [32] Special Offering and type of that program?

A. Yes.

Mr. Tongue: That is all.

(Witness excused.) [33]

WILLIAM J. BURGOYNE

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. Your name is William J. Burgoyne?

A. Yes.

Q. Employed by the War Assets Administration? A. Yes.

Q. In October, 1946, in what capacity were you engaged?

A. I was Acting Chief of the Automotive and Construction Machinery Division.

Q. The Construction Machinery Division?

A. Yes.

Q. Did you have referred to you, among other

(Testimony of William J. Burgoyne.)

things, certain universal gear joints? A. Yes.

Q. For disposal? A. Yes.

Q. As the head of that division, will you state the practice—not the practice that what was done with reference to advertising those commodities for sale.

The Court: Didn't you cover this once? Isn't this cumulative? Did you cover this once?

Mr. Harr: Possibly a little bit, except that I think this [34] gentleman will go into the matter of it being under his direction. It is somewhat cumulative.

The Court: Don't have him cover what Mr. Givens testified to.

Mr. Harr: Q. This C-286, that was put out as a special offering? A. Yes.

Q. That was published on a bid basis?

A. On a bid basis, yes.

Q. Did you receive any bids?

A. I don't recall.

Q. At least, it was not sold on bids, is that correct? A. Not that I recall.

Q. That is, this particular residue we are talking about now?

A. No. This was not sold on a bid.

Q. Those items were not sold on bids?

A. No. This residue is sold on a negotiated basis.

Q. In other words, you got no bids, and then you negotiated with people that came in, is that correct?

(Testimony of William J. Burgoyne.)

A. After the article is advertised. In cases where it is advertised on a fixed price and no bids received, then we offer it again on a sealed bid and then, if no sealed bids are received, we offer it on a negotiated sale.

Q. Do you know whether or not this was advertised previously on a fixed-bid basis? [35]

A. This was only advertised on a sealed bid basis.

Q. Your authorization extended to \$50,000?

A. Yes, sir.

Q. Are you in a position to say that the total declared value of those articles exceeded \$50,000?

A. No, I am not.

Q. That is the cost price, the cost price of all these articles sold? A. The declared value?

Q. In this residue?

A. I knew at the time that it did not exceed \$50,000.

Q. That it did exceed \$50,000?

A. Did not exceed \$50,000.

Q. You say you knew that at the time of this sale? A. Yes, that is right.

Q. Where did you get that information?

A. The acquisition code, taken off the WAA4s.

Q. Do you refer to the WAA4s to determine the declared value? Did you, I mean?

A. Not personally, no, I did not.

Q. As a matter of fact, the gears alone exceeded \$62,000, did they not?

(Testimony of William J. Burgoyne.)

A. I don't know whether they exceeded \$62,000 or not.

Q. You did not know it at that time, either?

A. No, not at that time. [36]

Q. Did Mr. Jones come to you in order to close up this transaction?

A. He did. However—Mr. Jones talked to Mr. Webb regarding this property and, as I recall, Mr. Webb came to me for permission to sell and I told him to go ahead and write up the order. I was busy. I had the whole commodity group to take care of and I was interviewing several people every hour and I didn't go into it very carefully at the time. However, I knew about what was going on, in all of these deals.

Q. It was apparently under your instructions that the deal was closed on a basis of \$75.00 for this residue, made with your knowledge?

A. Yes.

Q. And consent? A. Yes.

A. Is that correct? A. Yes.

Q. Referring back to those forms, did you sign your name?

A. Mr. Peterson signed my name and put his initials below.

Q. Mr. Peterson was in your department at that time? A. Yes.

Q. As I understand it from the testimony of Mr. Givens, he had no authority to make the sale?

A. He had no authority to okeh, yes, that is

(Testimony of William J. Burgoyne.)

right, okeh any sale, but he had authority to sign my name. [37]

Q. Were these gears automotive equipment?

A. At that time I presumed they were.

Q. How did you come to that conclusion?

A. Because they were sent into my department for programming, and I had the Automotive and Construction Machinery Division. Any commodity coded to me was sent into my department, automotive and construction machinery.

Q. Do you know that you did, then, at any time carefully consider these items and the description of them?

A. No. I looked at the WAA4s but did not do it very thoroughly.

Q. You saw "universal gear joints"?

A. Yes.

Q. And, through that, you assumed that it was automotive equipment?

A. I assumed that it might be, yes.

Q. Was it automotive equipment?

A. Since then I have found out that it was not.

Mr. Tongue: The Government has maintained that its agents were not negligent in this transaction and, therefore, we submit that this line of questioning it not proper. It is contrary to their contention in the case.

Mr. Harr: I do not believe that is our contention, your Honor.

The Court: Well, go ahead.

Mr. Harr: Q. Did you later have some discus-

(Testimony of William J. Burgoyne.)

sion with [38] Mr. Jones? A. Not later.

Q. Did Mr. Jones tell you that he had previously worked at the shipyards and knew the value of these items? A. No, sir.

Q. Did he tell you they were worth around \$39,000?

A. No, sir; not that I recall, no, sir.

Mr. Harr: I think that is all.

Cross Examination

By Mr. Tongue:

Q. Mr. Burgoyne, have you had any experience in the automotive industry? A. Yes, sir.

Q. How many years?

A. I was ten years with the Ford Motor Company, Portland Branch.

Q. You are familiar by now—

The Court: What do you claim these things were worth, Mr. Harr? I am asking him.

Mr. Harr: They are worth, scrap value, \$2,260, and a cost of \$62,000.

The Court: I did not ask what they cost. I asked you what you claimed they were worth. What do you claim they are worth?

Mr. Harr: That would be a matter we don't know, your Honor.

The Court: A lot of things we don't know. We don't know whether we are going to heaven or hell, but we have to form an [39] opinion about it. What do you think they were worth? What do your people think? How badly were you cheated, as you claim you were cheated?

(Testimony of William J. Burgoyne.)

Mr. Harr: We will take the defendant's figures on that, your Honor. He says they are worth \$39,000 and some odd cents—thirty-nine thousand and some odd hundreds of dollars, I mean.

The Court: That does not sound very sensible to me, but go on. You do not expect to put on testimony as to what they were worth?

Mr. Harr: Well, we will put on testimony as to the very minimum they would sell for.

The Court: How much?

Mr. Harr: \$2,260.

The Court: That is what I wanted to know.

Mr. Tongue: Q. Mr. Burgoyne, you say you thought that this was automotive equipment, is that right? A. I presumed so.

Q. Did you ever see an automotive gear joint that operates on a gear and has a shaft?

A. Well, not exactly a gear, no.

Q. Do these gears—these gear joints operate on a gear and have a shaft?

A. From the description, yes.

Q. Was the description complete and accurate?

A. I didn't pay enough attention to the description when [40] programmed them.

Q. Is it not true that automotive gear joints ordinarily have a pivoting socket rather than a shaft?

A. Some of them have a socket at one end and are solid at the other end.

Q. Referring to the Special Offering, C-286, Ex-

(Testimony of William J. Burgoyne.)

hibit No. 1, where does it show these gears to have been located?

A. At one of the Maritime Commission ship-yards.

Q. Is it a fact or isn't it, that the Special Offering also includes various other items that could not be properly classified as automotive equipment?

A. There are some items on there that could be classified as construction equipment, yes.

Q. There were other items located at the ship-yards, were there not?

A. As I recall, yes.

Q. Was that Special Offering mailed out to various interested persons?

A. It was mailed out to the automotive and hardware, machinery and construction machinery—

Q. To what classes of interested persons was that Special Offering mailed?

A. To automotive, construction machinery, and heavy hardware, which list also contained scrap dealers.

Q. Sent to the principal scrap dealers in the Portland area? [41]

A. I suppose so.

Q. Do you know whether it was sent to the automotive parts dealers?

A. It was sent to the automotive part dealers on the automotive list.

Q. But it was also sent to these various other individuals?

A. Construction machinery and heavy hardware.

Q. Were any bids received as a result of this offering?

A. I can't recall.

(Testimony of William J. Burgoyne.)

Q. Even if you knew that these gear joints were not automotive equipment, would that have changed your program in any respect?

A. It might have.

Q. I will call your attention to the time when your deposition was taken, October 21, 1947, in the United States Attorney's office, when, in response to the question: "Even if you supposed or knew that these were not automotive equipment, would that have changed your program? Would that have changed your program in trying to sell these goods?" you answered: "No, it would not have changed my program." Do you recall that now?

A. Yes, I recall that. It would not change the program, inasmuch as these are sent to other than automotive, to construction machinery and scrap dealers and heavy hardware.

Q. So, the fact that you thought it was automotive equipment did not make any difference, did it?

A. Not entirely, no. [42]

Q. I will ask you whether there was anything else you could have done if you had known that it was not automotive equipment?

A. Possibly we might have found some other way to advertise it or advertise it in another offering but, at the same time, it might have gone to these same people on the same list.

Q. I call your attention to the same deposition in which you were asked this question: "Was there anything else that might have been done to receive bids on these goods?" And your answer: "Well,

(Testimony of William J. Burgoyne.)

there is nothing that we could have done to offer them in any other way so that we would receive them, except just taking a chance by reprogramming them like we did. We reprogrammed them and tried to get bids again." You recall that?

A. Yes, I recall that.

Was the method by which these goods were sold to Jones in any respect contrary to the custom or practice of the War Assets Administration at that time in disposing of residue remaining after no bids had been received?

A. Not necessarily, no.

Q. Mr. Burgoyne, is it a fact, or is it not, that a price between \$900 and \$1,000 was first placed on that residue? A. I don't know.

Q. Is it a fact that it was later reduced to a figure of approximately \$250?

A. I couldn't say. I never came in contact with that deal.

Q. Who authorized that deal? [43]

A. I don't know whether the deal was authorized or not.

Q. But at least you did authorize the sale to Mr. Jones at \$75.00, is that right?

A. Yes, sir.

Q. When did you first meet Mr. Jones in connection with this transaction?

A. The day that he talked to Mr. Webb, as I recall.

Q. Did Mr. Webb, when he brought Mr. Jones

(Testimony of William J. Burgoyne.)

to you, as he has testified, also bring along a list of the various items?

A. I don't recall whether he did or not.

Q. Was that list the same as the Special Offering with equivalent description?

A. I don't know whether he brought a list or not.

Q. Do you remember any of the conversation between yourself and Jones?

A. No, sir, I do not. I talk to so many people I don't recall the conversation.

Q. Do you remember anything that he said?

A. No, sir.

Q. Do you remember anything you said to him?

A. I can't recall, no.

Q. Do you remember whether there were any conversations regarding these gear joints?

A. I don't recall.

Q. After you told Mr. Jones you would sell him this residue for [44] \$75.00, what did you do then?

A. Mr. Webb came over and asked me if the sale would be okeh, if we sold it for \$75.00, and I told him to go ahead and write up the sale.

Q. Did he then write up the sale or have it done?

A. I suppose he had it written up, yes.

Q. Did he then bring the papers to you?

A. Not to me, no sir.

Q. At that time did you go to Mr. Zanon and confer with him? A. No, I didn't.

Q. Were the documents entitled Forms WAA2 ever submitted to Mr. Zanon by you?

(Testimony of William J. Burgoyne.)

A. Not that I recall. They go through channels—. When the WAA2 is made out, it goes through certain channels. Mr. Peterson signed my name "Okeh." and initialed it and then, in the course of procedure, it goes to Mr. Zanon to okeh it.

Q. You do not recall going to Mr. Zanon at the time Mr. Jones came? A. I do not.

Q. Would you be sure that you did not do that?

A. I could not—I can't recall going to Mr. Zanon with this WAA2.

Q. But you don't know whether you did or not?

A. That is right. I can't recall.

Q. Now, Mr. Burgoyne, referring to these Forms WAA2 where it [45] indicates the type of the sale, I will ask you if, according to the custom and practice of the War Assets Administration, that space would be filled in to refer back to the type of the original program?

A. In this case it might be a typographical error. It shows the original program C-286 and the type of sale as "bid."

Q. Does that refer back to the original type of program?

A. It might have been the procedure. I am not sure.

Q. Doesn't it frequently happen where goods have only a special or limited use, if no bids are received, they are sold on a negotiated basis for whatever offering may be made, even though it is a small fraction of the original cost price?

(Testimony of William J. Burgoyne.)

A. In most cases the residue is reprogrammed and offered on a bid basis.

Q. Do you deny what I have said has happened?

A. In some cases, material is offered on a negotiated sale, material that was not necessarily in big demand.

Mr. Tongue: That is all.

Redirect Examination

By Mr. Harr:

Q. Do you know about the manner in which it came to your attention that delivery was declined with reference to the gears?

A. Mr. Strong called me up and said Mr. Hull of Oakland, the Maritime Commission at Oakland, had called him and told him he had withdrawn the material from sale. [46]

Q. From the Maritime Commission?

A. Yes. Mr. Strong was with us at the time.

Q. The first notice was when Mr. Jones went to get delivery at the Maritime Commission and delivery was refused, is that correct?

A. Yes, sir.

Q. I will ask you whether or not you had any authorization to ever sell anything below scrap value?

A. No.

Q. Had you read the description of the merchandise listed, particularly about the gears, would that description have put you on notice as to value?

A. If I had gone into it thoroughly, yes.

Q. By the way, Mr. Burgoyne, you were unable

(Testimony of William J. Burgoyne.)

to recall a conversation. You were pretty busy along about October, 1946?

A. Very busy, yes.

Q. Do you remember how many people you saw in the course of a day?

A. Between telephones—

Mr. Tongue: That is immaterial, I suggest.

A. Between telephones and people coming in, I should judge about between ten and twelve an hour.

Q. You mentioned you had previously had automotive experience with the Ford Motor Company, ten years. How long before October 30, 1946, was the period of your employment with Ford? [47]

A. Left the Ford Motor Company in June, 1933.

Q. Between 1933 and 1946 what were you doing?

A. I was in business for myself.

Q. The restaurant business, I believe?

A. Yes, that is right.

Q. Had there been any change in automotive gears and so forth during that period of time?

A. I suppose there may have been, yes.

Mr. Harr: I think that is all.

Recross Examination

By Mr. Tongue:

Q. How did you learn the Maritime Commission had withdrawn these? A. How did I learn?

Q. Yes.

A. Mr. Bob Strong called me on the phone and said Mr. Hull had called him from Oakland, as I understand.

Q. Were any goods withdrawn other than the

(Testimony of William J. Burgoyne.)

gear joints themselves? A. Couldn't say.

Q. Do you know whether other items were withdrawn? A. I don't know.

Q. There has been testimony of the scrap value of these gears. I will ask you if it is not a fact that these gears were made of steel and bronze, that is, certain parts were steel and certain parts were bronze? [48]

A. I have no knowledge that they are.

Q. Is it not a fact that, in order to realize the maximum scrap value on these gears, each gear would have to have been taken apart to separate the steel from the bronze?

A. If they had been sold for scrap to scrap dealers, would have had to have been separated.

Q. Would not automotive universal joints also have had a substantial scrap value if they could be used for the purposes for which they were manufactured? A. Yes, but not as scrap value.

Q. Thinking that these were automotive gears, did you think \$75.00 represented their scrap value?

A. When the deal was made I did not realize the value of the commodity.

Q. Even if they had been automotive gears, would they not have had a scrap value far in excess of \$75.00? A. They would have had, yes.

Q. As a matter of fact, there were many sales made at that time at less than scrap value, were there not? A. I couldn't say.

Mr. Tongue: That is all.

(Testimony of William J. Burgoyne.)

Redirect Examination

By Mr. Harr:

Q. A certain number of these gears were practically all bronze? A. A certain percentage.

Q. Could those have been sent direct to bronze metal works in the condition they were in without any preparation?

A. I don't know the procedure, but I would say that they would have had to separate the steel and bronze. That is my opinion of it.

Q. Do you know what the scrap value of these gears was? Are you called upon in your work to compute the value of scrap?

A. No, not in my department, I am not.

Q. Do you know anything about the scrap value?

A. No; that is taken care of in another division.

Q. In computing the scrap value of automotive universal joints, would that be within your knowledge?

A. Not the actual value. The price of scrap fluctuates. In fact, I do not have any contact with selling of scrap, at the present time or in the past.

Q. You have never been called upon to evaluate metal for scrap, is that correct?

A. No, sir, I never have.

Mr. Harr: Your Honor, I want to introduce in evidence some of these gears. They have been marked as pre-trial exhibits.

Mr. Tongue: I thought all the exhibits were in evidence.

(Testimony of William J. Burgoyne.)

The Court: They are all in.

Mr. Harr: They are in, subject to objection. Of course, we may want to examine some of them later.

The Court: They have all been admitted, subject to any [50] objection.

Recross Examination

By Mr. Tongue:

Q. Is it not a fact that this Special Offering was sent to scrap dealers in Portland?

A. Scrap dealers would come under the mailing list that we put out, yes.

Q. Then, this Special Offering was sent to them?

A. Scrap dealers, yes, that used that kind of material.

Q. I will ask you whether this Special Offering was sent to scrap dealers?

A. Not as scrap dealers, but under heavy hardware.

Q. You received no bids from them whatever?

A. As I recall, no.

Q. How did you determine \$75.00 was a fair price for this residue?

A. It was an oversight on my part, due to the fact that I had not investigated the type of material that was offered for sale, regarding the universal joints.

Q. How did you determine \$200 was a fair price, as it was previously offered? A. Pardon?

Q. Is it not a fact that this residue had been

(Testimony of William J. Burgoyne.)

offered for some \$200 before Mr. Jones came there?

A. I didn't know of any deal of that sort, no.

Q. Didn't you testify that you recalled that there was a \$200 figure placed on this residue for a time?

A. I don't know of any deal.

Q. Regardless of whether or not there was a deal pending, and anyone at that time interested in it, is it a fact, or is it not, that it had been discussed that the War Assets Administration should sell this residue for around \$200?

A. I don't recall.

Q. You would not deny it, would you?

A. I don't recall having anything to do with that deal.

Mr. Tongue: That is all.

Redirect Examination

By Mr. Harr:

Q. I will hand you Exhibits No. 4-A to No. 4-I, inclusive. Can you tell us, as pertaining to the particular items listed there, what the condition of them was?

A. Exhibit 4-A, dump body, R-3 condition. That is, usable with repairs. 4-B—

Mr. Tongue: I submit that is not proper redirect examination.

The Court: Try to get it all in one question, Mr. Harr.

Mr. Harr: Q. Proceed.

A. 4-B is in N-2 condition. That is, new. That was brass cock plugs.

(Testimony of William J. Burgoyne.)

4-c was in R-3 condition. That is, usable with repairs.

4-D was in N-1 condition. That is, new. [52]

Q. What is the item?

A. Kingpins. 4-E Norgren Lubricator, in No. 3 condition. That would indicate that it would be usable without repairs. It doesn't indicate whether it is N or R, but when it is just 3, it would be usable without repairs.

4-F Allis-Chalmers parts, spare parts, N-2. That is new.

4-G, miter gears, N-2. That is new.

4-H, N-2, universal joints. That is new.

4-I, chess wagon, O-4 condition. That is, usable without repairs.

Here are some more cock plugs, but that is all.

Mr. Harr: That is all.

(Witness excused.)

The Court: What are you trying to rescind? What did the defendant get?

Mr. Harr: The items that were just referred to by the last question. They were covered all in one sale and some of them were delivered.

The Court: They were all delivered to the defendant but the—

Mr. Harr: Universal gear joints.

The Court: What are you trying to rescind?

Mr. Harr: The entire transaction, your Honor.

Mr. Tongue: On that point, your Honor, I call the Court's attention to the fact that it was not

until four days ago that any claim was made by the Government that the entire transaction should be rescinded. At all times previously, including the position taken by the Government when it filed its original complaint in this case, the prayer was only that it should be rescinded as to the universal joints. There has never been, at any previous time, any representation made that the sale of the other items was not a valid sale.

The Court: How could you rescind the sale of the joints when he didn't get the joints?

Mr. Harr: Of course, your Honor, it was all in one sale, and we feel that we should ask for a rescission of the entire sale. We have asked in the prayer for alternative relief, at the defendant's election.

Mr. Tongue: Sales documents were issued, your Honor, and they warrant that the Government had the power to transfer title and, according to the War Surplus Act, when sales documents are issued, that would foreclose them, according to our position, claiming any mistake or lack of authority.

The Court: You fellows get to talking about everything except what I am asking you about. Let's get back to the original proposition.

Mr. Tongue: Yes.

The Court: Stay with my first question. We will deal with [54] other things later. What was there to rescind if he did not get delivery?

Mr. Harr: According to what counsel has just stated, under the law, when a sales document is issued, title has passed, title transfers. That sec-

tion of the Act, if I may read it, provides: "A deed, bill of sale, lease or other instrument executed by or on behalf of any Government agency purporting to transfer title or any other interest in property under this Act shall be conclusive evidence of compliance with the provisions of this Act in so far as title or other interest of any bona fide purchases for value, or lessees, as the case may be, is concerned."

The Government takes the position here that probably title has passed but we contend he was not a bona fide purchaser.

The Court: What you want to rescind is the document?

Mr. Harr: That is right, the sales document.

The Court: You want him to produce that in court for cancellation or correction in some way and give it back to him?

Mr. Harr: Yes.

The Court: What is this case referred to in the Circuit Court? What is that?

Mr. Harr: That was a case, your Honor, filed by the defendant for replevin.

The Court: What defendant?

Mr. Harr: The defendant Jones, the same party.

The Court: What happened to that case? [55]

Mr. Harr: That is pending, by stipulation of counsel, pending determination of this case.

✓ The Court: What do you do with this warranty clause in the Act? How do you get around that?

Mr. Harr: We say, your Honor, he is not a bona fide purchaser, and that is the only way legal title

would pass, if he is a bona fide purchaser. The Act says that the title is conclusive, as far as any other interests, of any bona fide purchasers in this case for value.

Mr. Tongue: Your Honor, we have considerable replies to that contention. If you want to hear them now we will be glad to state them. In the first place, we say there isn't any evidence, and we don't think there is, and the burden is upon the Government. Mr. Burgoyne doesn't remember anything that was said. Mr. Webb's only recollection is that this man, whom he knew had worked at the shipyards, said, "Well, what will I do with all this junk", and that in talking about that reference was made to the chess wagons. That is absolutely all of the evidence that has been submitted to establish that this man is not a bona fide purchaser, and we submit that is insufficient.

In addition to that, we submit that even if Mr. Jones is not a bona fide purchaser that the Government has not—Of course, it hasn't completed its case yet—but we submit there is no mistake in this case, either mutual or unilateral; and that there wasn't any lack of authority to make this sale since [56] we will show it was approved by Mr. Zanon who did admittedly have authority to make sales in this amount.

There are a number of other contentions that we make. They are all summarized and listed.

The Court: Yes, but I don't want to read that. You go on and tell me. I don't want every little point you make—You are a great point lawyer.

Mr. Tongue: Well, those are the first points that we have, your Honor. Then we also contend in this case that this question of whether or not there was a mistake made as to whether this was automotive equipment or not—and that constitutes their first two contentions—we say that is wholly immaterial, and we have shown by Mr. Burgoyne's deposition that it didn't make any difference. Even if he had known it was automotive equipment, there would have been no change in the program whatever; and then we contend, as I have mentioned, that there can't be a partial rescission of a contract, and up until four days ago there has been no attempt to rescind anything other than the sale of these joints. And in that connection I would like to call the Court's attention to a case that we rely on quite heavily. It is *Railway Co. vs. McCarthy*, 96 U.S. 258. That was a case in which the claim was made on trial that a contract was invalid as having been made on Sunday, and with the Sunday laws prevailing at that time—

The Court: They still prevail. It is still against the law to do a lot of business on Sunday. [57]

Mr. Tongue: Yes, that is right.

The Court: You can't give a note on Sunday, a good note.

Mr. Tongue: But what the court said—That was not raised originally and, not having been raised originally,—when a party gives a reason for his conduct and decision touching anything in an action in controversy he cannot after litigation is begun

change his ground and put his conduct on a different consideration.

The Court: What does a bona fide purchaser mean? We roll that off our tongue all the years we practice law. What does it mean?

Mr. Tongue: Well, in this, I think, your Honor, it means simply this, that anybody going out to the War Assets Administration with knowledge of their practices, the great bargains that have been made there, is a bona fide purchaser when he buys something, even though he thinks that he may be able to turn around and sell it for a lot more than he has to pay for it, even though he knows that the Government may, and very often has, sold goods for a fraction of their original cost, that doesn't destroy his status as a bona fide purchaser, we submit, because many of these are special items that have no standard use, could only be sold for scrap.

The Court: What is the mistake the defendant is supposed to have made?

Mr. Tongue: He hasn't developed that. I am not entirely [58] clear what they do claim.

The Court: What is the mistake?

Mr. Harr: Well, your Honor, originally this was based on mutual mistake, and, after all this comes up, after pre-trial conference, the defendant for the first time puts us on notice, "I knew all about this."

The Court: The mistake is out the window, then?

Mr. Harr: That is true.

The Court: All right, now, then, what has he

done that excepts him from the bona fide-purchaser provisions of the statute? What has he done wrong that makes him something other than a bona fide purchaser?

Mr. Harr: Well, in the first place, he misled them by his conduct. He indicated it was a "bunch of junk." He knew all the while and kept it silent as to what its true value was. He knew and he says that he knew the nature and the use of this material and the value of it, and there is a record in the pre-trial record that he knew and knew all the time, and certainly if he knew that—and as he said in his amended complaint filed in the Circuit Court case where he went on oath and said it is worth \$39,000 and some odd figures,—then he certainly is taking advantage of the Government employee. He knows that we don't know and calls it a "bunch of junk."

Mr. Tongue: I think we are anticipating some of the evidence here. [59]

Mr. Harr: It is unconscionable and does not follow the terms of the Act and the objects to be accomplished in this Act.

Mr. Tongue: I think Mr. Jones should be permitted to testify on that before there is any ruling made because that is an important phase of the case.

The Court: I just want to find out what it is all about.

Mr. Tongue: Yes, that is it. We have a good many answers to that that will develop with the evidence.

The Court: It seems to me that the case comes down altogether to whether he is a bona fide purchaser under all the circumstances, Mr. Harr.

Mr. Harr: And, of course, your Honor, we certainly attach great reliance upon the fact that here is merchandise of a declared value, and it is set forth in the Act that they cannot sell beyond—

The Court: Two things, then. They exceeded their authority, and that he is not a bona fide purchaser in the Act, that his conduct was unconscionable.

Mr. Harr: And the act could not be valid because it didn't comply with the objects of the Act, and I think that is mandatory.

The Court: What do you mean now; what are you saying now?

Mr. Harr: By a reference to the objectives, the Congress hereby declares that the objectives of this Act—

The Court: I know about that. There are two points in the case. Now, then, (1) where there was an excess of authority, and [60] (2) whether his conduct was so unconscionable as to make him other than a bona fide purchaser within the meaning of this Act. That is what this case is about, isn't it?

Mr. Harr: And (3), under the Act itself that they could not have—Maybe your Honor is combining that—that he exceeded his authority and that he didn't have authority to make that size of a sale. That is one lack of authority. And the second lack of authority is under the terms of the Act itself—

Another point - whether the case is...

Mr. Tongue: May I just state very briefly—

The Court: What is the other point about lack of authority?

Mr. Harr: Where he exceeded his authority, that in other words the declared value of this merchandise—

The Court: I have that. What is the other?

Mr. Harr: And the other is by virtue of the terms—

The Court: Don't read it; just say what it is. What was the other limitation?

Mr. Harr: It doesn't speak of limitation, your Honor. Your Honor has perhaps read that.

Mr. Tongue: If he was a bona fide purchaser, that is conclusive evidence of compliance with the Act.

Mr. Harr: (Reading) "to foster the wide distribution of surplus commodities to consumers at fair prices;"—"to discourage disposal to speculators;"—sales to be made at a price so that they couldn't dispose of it for speculative purposes and for dumping upon the market. [61]

The Court: What are you reading from, the preamble?

Mr. Harr: The front part.

The Court: The preamble.

Mr. Harr: Yes, the objectives.

Mr. Tongue: Our reply is simply this, that if he is a bona fide purchaser it forecloses any argument as to authority to make the sale or that the sale is for any other reason not in compliance with the Act. We say, first, that there is no evidence

that he is not a bona fide purchaser, and we say, second, that they have at all times previously conceded he was in good faith and are now foreclosed from raising at this late point the claim that he is not a bona fide purchaser.

The Court: See what he says, that the warranty clause in the Act covers the matter of authority, extent of authority, too, Mr. Harr.

Mr. Harr: You mean what Counsel mentioned?

The Court: Yes.

Mr. Harr: I was reading, I wanted to quote this section.

The Court: Listen to this. He says the warranty clause in the Act covers the extent of your agents' authority, too, that even though your agent exceeded his authority, if he acted bona fide that the warranty clause covers it.

Mr. Harr: I am going to ask my co-counsel on that.

Mr. Conklin: Your Honor, we feel that although that states that, that is to protect the bona fide purchaser when the rest [62] of the Act is complied with. Surely it could not mean that any agent of the Government could bind it even though he did not comply with the Act.

The Court: It could mean it. Now we will take ten minutes and then we will go at it again.

(Short recess.)

Mr. Harr: Your Honor, I would like to recall Mr. Burgoyne for one question.

The Court: Ask him back there.

Mr. Harr: Mr. Burgoyne, have you ever seen these gears or gears like them?

Witness Burgoyne: No, sir.

Mr. Harr: You were located at Oregon Ship-yards?

Witness Burgoyne: Yes, sir.

Mr. Harr: I should also like to ask Mr. Webb the same question. Mr. Webb, at the time this sale was made had you seen the gears?

Witness Webb: No, sir.

Mr. Harr: Did you know what they were like?

Witness Webb: No, sir.

Mr. Tongue: Mr. Burgoyne, did you have a description of the gears available to you at that time?

Witness Burgoyne: There was a description on the WAA4.

Mr. Tongue: Was that a complete and adequate description.

Witness Burgoyne: It was a short description.

Mr. Tongue: I will ask Mr. Webb the same questions. Did you have a description of the gears available?

Witness Webb: On the program?

Mr. Tongue: Yes; as described in the Special Offering 286?

Witness Webb: That is right.

Mr. Tongue: No further questions.

Mr. Harr: We will call Mr. Zanon.

LOUIS A. ZANON

was thereupon produced as a witness in behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. Mr. Zanon, you are employed by the War Assets Administration? A. Yes, sir.

Q. And what is your official title there at this time?

A. Assistant Deputy Regional Director in charge of Disposal and Sales Planning.

Q. And on October 30, 1946, were you employed by the War Assets Administration?

A. Yes, sir.

Q. And what was your official title at that time?

A. The same title, only Acting.

Q. Now, Mr. Zanon, you are familiar with these gears, are you? [64] A. Yes, sir.

Q. And did you make a computation as to the scrap value of these particular gears themselves, eliminating the other items listed in the residue, just the gears? A. I did, yes, sir.

Q. And what was the value, scrap value at that time? A. At that time there was \$2,260.

Q. Is it greater or less now?

A. More, much more now.

Q. Now, there was a question asked about the breaking of these gears up, and so forth, in order to obtain the scrap value. What is the fact as to that?

(Testimony of Louis A. Zanon.)

A. Part of them would have to be broke up, but there is about 1,700, I believe, that could be shipped to the foundry direct. They are about 95 per cent brass. Of course, they would lose in shipping them to the foundry the steel contents, but they would recover the full value of the brass of the 1,600 or 1,700 of them.

Q. And you also heard the question asked why the scrap dealers didn't bid on it. Have you an explanation of that?

A. If they were programmed and listed as scrap we would have probably had bids from all over the country if the word "scrap" had been used at the time they were advertised for sale, but most of the scrap dealers, for some reason or other, are not too keen of going down these sales listings and reading the description [65] of all this material. They see that word "scrap" and, of course, that is what they are interested in and they know there is so many pounds of it, go out and take a look, figure the tonnage, and give you a bid on those bases.

Q. Now, did you, after this sale was purportedly made—Was there across your desk a certain document entitled WAA2a?

A. All the documents at that time came across my desk.

Q. I would like you to refer to Government's Exhibits 3-A to I, inclusive, the photostats. Now, I will ask you whether or not—what that indicates

(Testimony of Louis A. Zanon.)

to you when you look at it, under the front portion where the word marked "bid" is stated?

A. This indicates to me that this was closed out on a bid offering, that bids were accepted in our regular procedure, such as a program or a bulletin was sent out to our trade and we received bids in the normal procedure, and that it was abstracted by our Bid of Awards and awarded by that committee.

Q. Now, since this transaction took place, have you determined that it was other than on a bid basis?

A. Well, from the evidence presented here and, of course, from the evidence I gathered after I talked to Mr. Jones, I discovered that it was a negotiated rather than a bid sale.

Q. Now, on the reverse side of one of those forms, the one pertaining to the gears in this case, I notice your signature. Would you refer to that, please? A. Yes, sir. [66]

Q. Does that indicate that you have ratified and approved this particular sale?

A. No, I would say not. That merely indicates that I authorized the sale of the material on those bases, on a bid basis, closed out on a regular program. We have no reason to hold these up when they come across the desk and they indicate they were sold under a regular procedure on a bid basis that was closed out on a program.

Q. Well, what happens when they are sold on a

(Testimony of Louis A. Zanon.)

bid basis? Does that go before a board or something?

A. We will have to go back to this program. We will take this, for example, 286, which was distributed to the various automotive dealers and scrap dealers. We have a date set for the opening of that program; that is advertised for no less than fifteen days and in some cases it will run twenty days, twenty-five or thirty days. On that specified closing date—If you will notice on the heading of that brochure it says, “Bids will be accepted up to 2:00 p.m.” February or January the 1st, whatever the date may be. Those lists are sent to us and they are deposited in a sealed bid box and opened at the time of the opening by our Awards and Allocation Branch. All the bids are opened at that one time and an abstract is made and they determine whether the price is satisfactory, in accordance with our upset prices, and they are allocated on those bases, taking into consideration priority claimants that might come in first; then it goes down to commercial levels.

Q. In other words, when the word “bid” is there, it indicates that board has passed on the sale and approved the sale? A. That is correct.

Q. And you are merely approving what you assumed the board had done?

A. That is correct.

Q. Now, what would have been the case had that been marked properly, as you indicated, if the word “negotiated” had been in there?

(Testimony of Louis A. Zanon.)

A. If the word "negotiation" would have appeared in there, why, of course, we would have to hold the thing up and find out who made the sale and on what basis it was made. It was just a matter of checking the various sales that come across the desk that require we sign these documents, and we question only those that indicated they were sold other than on a fixed price or a bid basis.

Q. Now, did you later become acquainted with Mr. Jones personally? A. Yes.

Q. Would you state the circumstances under which you——

Mr. Tongue: Your Honor, I submit that what happened after this sale was consummated, any contact between Mr. Zanon and Mr. Jones, has no bearing on this case, particularly. The issue is whether he was a bona fide purchaser.

The Court: Maybe he is going to show an admission Mr. Jones [68] made. Go ahead and answer.

A. Several days after this sale was made—I don't know whether it was two days or three days or four days—Mr. Jones was brought to my desk by one of the men in the automotive section and he introduced Mr. Jones to me, and Jones told me about his purchase of a large quantity of material, approximately \$60,000 worth.

Mr. Harr: Q. Did he use those figures?

A. Yes. And he told me what he had paid for it. And I said, "Mr. Jones, I am sorry, but right now I can't answer your question. I will find out

(Testimony of Louis A. Zanon.)

more about it." I went back to the automotive section and questioned the boys there as to just what had taken place and they told me he had bought these universal joints and some truck bodies and a few other items, and they told me the basis that they made the sale on, and I went back to Mr. Jones and asked him if he knew at the time that he was getting this exceptional bargain for that much money and he said he did, and then I told Mr. Jones that I didn't blame whoever was stopping the sale but that there was nothing I could do, that he had better go back and talk to our Regional Counsel, Mr. Stocklen; and I saw Mr. Jones one time after that in the hall and he told me then that he had an attorney. That is the last time I had seen him up until today.

Q. Did he tell you about his experience working in the shipyards and how he became acquainted with the value of these gears? [69] A. No.

Q. He did say that he knew at the time that it was \$60,000?

A. Well, he mentioned a figure of sixty. I don't know whether he said 65 or 63. He mentioned \$60,000, in the sixties.

Q. Do you know whether the authority that was given to Burgoyne and these other salesmen, whether that was on a fixed-fee price, or did it also include a negotiated—

A. I believe that at that time all signatures on documents were limited to fixed price.

Q. In other words, would Mr. Burgoyne have

(Testimony of Louis A. Zanon.)

had authority at that time to have made a negotiated sale?

A. I wouldn't say definitely, but I don't believe that his signature would have authorized the sales.

Mr. Tongue: Testimony as to the authority of another is thoroughly incompetent.

Mr. Harr: Q. You were over Mr. Burgoyne?

A. That is correct. Of course, these procedures change so rapidly—but at that time I am almost sure they were limited to the fixed price only, a hundred thousand dollars or fifty thousand dollars, providing it was sold on a fixed-price basis.

Q. Would that include, then, a negotiated sale?

A. That is correct—No, it wouldn't include a negotiated sale, no.

Mr. Harr: You may inquire. [70]

The Court: No limitation as to authority of negotiated sales?

Mr. Harr: Q. Do you mean they have authority or not authority?

A. They did not have the authority to negotiate a sale under the fixed price.

The Court: What does that mean?

A. Fixed price is determined.

The Court: I know what that is, a fixed price. Your man couldn't sell something that cost the Government more than \$50,000. Where he negotiated the sale was there such a limitation on his authority?

A. Yes, absolutely there was a limitation.

It could easily be said

(Testimony of Louis A. Zanon.)

The Court: What was it?

A. They didn't have the authority at that time to negotiate a sale.

The Court: The point now is that they couldn't negotiate any sale?

Mr. Harr: Is that your testimony?

A. You could negotiate a fixed-price sale.

The Court: I don't understand that.

Mr. Harr: Q. Explain to the Court how they normally proceeded with a fixed price——

The Court: Oh, don't go over all that again. That isn't necessary. Two witnesses have said there are three things that [71] could be done. One was a fixed-price sale, another a sealed bid, and, third, a negotiated sale. Now, he says they couldn't negotiate any sale. By "negotiate" we mean whatever price the parties agree on.

Mr. Harr: Well, I may be incorrect, but I understood that on these commodities there is a fixed price placed on them and then underneath that fixed price they are not entitled to negotiate. If I am wrong, will you correct me?

A. How is that again?

Q. There is a fixed price fixed on commodities?

A. On certain commodities, yes.

Q. And below that fixed price these gentlemen would not have authority to negotiate a sale, is that correct?

A. The fixed price in this case would have been the price of scrap.

(Testimony of Louis A. Zanon.)

The Court: Here is what has been testified to previously, Mr. Harr: That the limitation was determined on what the property had cost the Government. Do you agree with me that is the testimony.

Mr. Harr: That is the declared value, your Honor.

The Court: And that is what it cost the Government?

Mr. Harr: That is correct.

The Court: That is what we have heard previously.

Mr. Harr: That is right.

The Court: Now, then, and that this man, the other man, had [72] a limit in dollars of \$50,000 and another \$100,000, and so on. That is what it cost the Government. This particular property cost the Government what?

Mr. Harr: Well in excess of \$62,000.

The Court: In excess of \$62,000. Now, what is he saying now about authority? This was a negotiated sale, according to one theory. What limitation was there on the authority of Mr. Burgoyne to negotiate the sale if this was a negotiation?

A. It was limited to \$50,000 in any type of sale, any method.

The Court: All right, we understand that. \$50,000 cost price to the Government?

A. That is right.

The Court: Go ahead.

(Testimony of Louis A. Zanon.)

Mr. Harr: You may inquire.

Cross-Examination

By Mr. Tongue:

Q. Mr. Zanon, I understand that you were the Regional Deputy in Charge of Disposal at that time? A. Acting.

Q. Acting?

A. Assistant Deputy Regional Director. I had the Director over me.

Q. Did you have authority in that capacity to sell these goods? A. No, sir.

Q. On any basis? [73]

A. Oh, on a fixed-price basis, yes.

Q. Would you have had authority to sell these goods on a negotiated basis?

A. At the fixed price, yes.

Q. You mean to tell me once a fixed price is set on a commodity it can't be sold at any less than that fixed price?

A. That is correct, yes, sir.

Q. And what did you say was the fixed price on these goods?

A. The scrap value of these goods was \$2,260.

Q. Now, how is that shown to be the fixed price that was placed on those goods?

A. By the metal contents.

Q. Where on these documents does that appear to be the fixed price?

A. Well, it is possibly not on those documents. There are a lot of other documents that we work with besides the WAA4.

(Testimony of Louis A. Zanon.)

Q. You mean to tell me, then, that nobody had any authority to sell these goods for less than \$2,200?

A. \$2,200—Oh, it could vary somewhat on a bid basis providing it came up somewhere near the scrap value. If there was a hundred or two hundred dollars difference they wouldn't kick it out.

Q. You say if bids were received and the bid was lower than scrap value you would take it, is that right?

A. If it was anywhere near the scrap value.

Q. But if no bids were received and you had it left over you [74] wouldn't sell it for less than \$2,200?

A. We would sell it.

Q. You wouldn't sell it for less even if there were no bidders?

A. We wouldn't have to sell it for less.

Q. Now, Mr. Zanon, you signed this Form WAA2, did you not?

A. That is correct.

Q. And by signing it you purported to give approval to that sale, did you not?

A. Not this particular sale, no.

Q. What do you ordinarily mean when you sign a Form WAA2?

A. I mean we have authorized it as far as the heading on this document is concerned.

Q. Who ordered this residue to be put up for sale for the best offer? Did—

A. I can't tell you.

Q. Did Mr. Williams do that?

A. I understand he had a hand in it.

(Testimony of Louis A. Zanon.)

Q. Was he the Chairman of the Awards Committee? A. That is correct.

Q. Is it the Awards Committee that you say passes on these bid sales?

A. The Awards Committee passes on the bid sales in conjunction with a Commodity Chief, Sales Manager, and Assistant Sales Manager.

Q. And you say when it has been approved by the Awards Committee as a bid sale you don't read any further? [75] A. That is correct.

Q. And still it was the Chairman of the Awards Committee that authorized this to be done, is that right? A. I don't know that.

Q. Now, after this sale was made to Mr. Jones by Mr. Burgoyne, did Mr. Burgoyne bring that Form WAA2 to your desk at that time?

A. No, sir.

Q. He didn't do that? A. No.

Q. Did he ever explain this sale to you?

A. No.

Q. Did he ever tell you that it was a residue left from a bid offering? A. No.

Q. Who first questioned this sale?

A. Who first questioned it?

Q. Yes.

A. As far as I know, the first time I knew about it was when Mr. Jones and one of the men in the office—

Q. Well, who questioned the authority to make the sale?

(Testimony of Louis A. Zanon.)

A. Who questioned the authority to make the sale?

Q. Yes; who raised the question of illegality?

A. Well, there were several of them at that time.

Q. Did Mr. Gibson of the Maritime Commission raise it first?

A. I couldn't tell you that. [76]

Q. Was it his refusal of delivery of these goods that raised the question?

A. I couldn't tell you that. I understand that from Mr. Jones, but whether that was the determining factor or not I don't know.

Q. Did Mr. Gibson ever question sales before?

A. Yes.

Q. Has any sale ever been rescinded before as a result of his questioning it?

A. Well, questioned on what basis? Let's get back to that.

Q. On any basis. A. He has, yes.

Q. What is that? A. He has, yes.

Q. Has any sale ever been rescinded?

A. Through his—

Mr. Harr: Just a moment. I thought your Honor had passed on this very point previously.

The Court: Yes, but you will have to call it to my attention.

Mr. Tongue: I withdraw that.

The Court: It may be withdrawn.

Mr. Tongue: Q. Was that Form WAA2 given the purchaser?

A. Form WAA2?

(Testimony of Louis A. Zanon.)

Q. Yes; or is this an inter-office memorandum?

A. This is an inter-office memorandum.

Q. It never goes to the purchaser? [77]

A. Well, we do in some cases—There are three copies, and it has been used sometimes in sales, I believe, but the normal procedure is the WAA2 is used in the office for billing purposes.

Q. Do you claim in this case the WAA2 form was given to Mr. Jones? A. No.

Q. Do you claim he had any document concerning these goods until he received the Form WAA1 called the sales document?

A. I would say he didn't have anything until he received his copy of the WAA1. I don't know.

Q. Now, when he came in and talked to you later, as you say, and said these goods cost the Government \$60,000—

A. I don't know that he said \$60,000 exactly. In the neighborhood of \$60,000.

Q. Yes. Did he say when he found that out?

A. Did he say when he found it out?

Q. Yes. A. No.

Q. Did he say he knew that at the time of the sale?

A. I asked him if he knew what he was buying and he said he did.

Q. Well, when you asked that question, how did you put it; did you say, "Do you know what you are buying?"

A. When I went back to Mr. Burgoyne's department and inquired about the sale I came back and

(Testimony of Louis A. Zanon.)

asked Mr. Jones if he knew that he was getting that much material for that much money. [78]

Q. What did he say?

A. He said, "I sure did," and he said, "I intend to get it, too."

Q. All right. Now, you say that the reason why no bids were received from the scrap dealers was because this wasn't described as scrap, is that right?

A. I didn't say that was the reason for it. I said if it had been described as scrap that we would have received numerous bids.

Q. Do you always describe goods as scrap in special offers that you send to the scrap dealers?

A. When they are goods of a special nature we do declare a lot of it scrap.

Q. And do you ever get bids from the scrap dealers on offerings that don't describe goods as scrap?

A. When they know what they are bidding on. Most of these scrap dealers have sidelines such as machinery, pipe, steel, and we receive bids from them, yes, but when it is a specialized item that they are not in the habit of handling, we don't, unless it has been declared scrap and listed as scrap.

Q. You swear, then, you never get bids from scrap dealers for goods they are going to use as scrap unless you name it as scrap?

A. Oh, I didn't make that statement, no.

Mr. Tongue: That is all.

Mr. Harr: Just a moment. [79]

(Testimony of Louis A. Zanon.)

Redirect Examination

By Mr. Harr:

Q. Coming back to this authority to sell or negotiate sales, are the type of sales that you are talking about—Who in your organization was allowed to sell that kind of merchandise?

A. Who in the organization? Well, that would be a concurrence. In other words, if a salesman went out and they got an offer on this material, why,—we receive many offers on material—and it is taken up with the different people in the organization and we receive a concurrence from the three or four people on this board to determine it, and they would naturally sign those documents of negotiation, and that is the reason I said that if it didn't meet the scrap value it would have to come awful close to it, and the Award Committee, in conjunction with the Sales Manager, would get together and review the thing to determine it.

Q. Now, would that be on the bid or negotiated sale? A. That would be negotiated.

Q. Did you sign the WAA1, the copy of the document?

A. The WAA1—I signed the WAA2.

Q. The inter-office form? A. Yes.

Mr. Harr: We have no further questions of this witness, your Honor, and the Government rests.

Mr. Tongue: I won't argue it, but for the record I would like to move for an involuntary nonsuit.

The Court: Reserve the ruling.

Mr. Tongue: Call Mr. Jones.

HERBERT A. JONES, JR.,

defendant herein, was thereupon produced as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tongue:

Q. Your full name is Herbert A. Jones, Jr.?

A. That is right.

Q. And you are a veteran?

A. That is right.

Q. And you are waiting to go back in the service on Friday, is that right? A. Yes.

Q. Now, when did you first come in contact with the War Assets Administration?

A. Well, it was some time shortly after I got out of the service, in May. I got out in May, and it was probably in the summertime of last year.

Q. And it was in late October when you went out to buy these Jeep motors, is that right?

A. That is right.

Q. And you bought this residue of goods?

A. That is right. [81]

Q. Now, at the time that you went out to buy those Jeep motors and bought this residue, had you heard anything about the sales practices of the War Assets Administration?

Mr. Harr: Your Honor, I object to that; I think it is incompetent, irrelevant and immaterial.

Mr. Tongue: Your Honor, I submit it is very competent.

The Court: It goes to the bona-fideness.

(Testimony of Herbert A. Jones.)

Mr. Tongue: That is right.

The Court: Continue.

Mr. Tongue: Q. Had you heard of the bargains that were available at the War Assets Administration?

A. Yes, I had. That is why I went out there.

Q. What were some of the specific bargains you had heard about at that time?

A. Well, I heard about the—

The Court: Don't go into too much detail, Mr. Tongue.

Mr. Tongue: Q. Had you heard of a number of instances in which goods had been sold by the War Assets Administration at a very small fraction of the original cost to the Government?

A. Several, yes.

Q. At the time you went out on this transaction you had that in your mind, is that right?

A. Well, not exactly. I did have it in my mind of getting a bargain, because that is the only reason I bought it, because I could get it for less. I wouldn't have gone clear out there [82] to buy it if I could buy it in town for less.

Q. Now, when did you first go out concerning the Jeeps, the Jeep engines?

A. Well, it was about, I imagine, about the 15th of October, just shortly after I bought a Jeep.

Q. And what were you told?

A. I think the first time I went out there I was told that there weren't any available.

Q. Did you go back later?

(Testimony of Herbert A. Jones.)

A. Yes, I went back several times.

Q. What did they tell you the next time you went back?

A. Well, one time—I don't know whether it was the next time or not—they told me there were two engines available, they weren't new but I could probably make one new one out of them.

Mr. Harr: Could you speak louder, please.

A. That I could probably make one new one out of them by putting the two together, and I would have to buy a bunch of other stuff because they were residue of a bid sale.

Q. Who told you that?

A. I believe Mr. Webb told me that.

Q. Did they tell you what you would have to pay for that residue?

A. Yes; the first time they told me nine hundred and some odd dollars. I don't remember the exact price. It was between nine hundred and a thousand dollars. [83]

Q. Did you go back later to inquire concerning the Jeep engines and that lot of goods?

A. Well, I found out it was still there, hadn't been sold, and I asked them if they had come down on the price, and they told me, I think, right close to \$250.

Q. I see. Did they tell you anything else at that time? A. Oh, no, not—

Q. Who told you that, do you remember?

A. No, I don't.

(Testimony of Herbert A. Jones.)

Q. Now, did you go back later and make any further inquiries?

A. No, I believe I called them the next time. I used to call them every once in a while to find out what they had.

Q. What did you ask when you called them?

A. Well, I asked them if those Jeep engines were still available.

Q. Did you ask whether the entire lot was still available? A. Yes.

Q. And what were you told?

A. I was told that it was.

Q. Were you told that any price had been fixed on that lot?

A. Yes, they told me \$75.00 was fixed on that lot.

Q. What did you do then?

A. I took a check up, told them I would take it, and took a check up to buy it.

Q. Who were you referred to when you reached the War Assets office? [84]

A. Well, I first went to the information girl and she sent me back to the machinery division, back to Mr. Webb.

Q. And what did Mr. Webb say to you?

A. He told me that there was a lot, that there was two Jeep engines for sale but I would have to buy several other items to get the two Jeep engines.

Q. Did he show you what the other items were?

A. Yes.

(Testimony of Herbert A. Jones.)

Q. Did he show you a written description of them? A. Yes.

Q. Was there any particular discussion of the gear joints?

A. No, I don't believe there was any particular discussion, no.

Q. Did you know then what these joints were?

A. Well, only in a speculative value. I knew they were worth—that they probably cost the Government considerable more than what they were selling for, but that didn't mean to me what they were worth to me. They were worth to me only what I could—

Q. Did you have any idea what you could get out of them?

A. Not at the time, I didn't know the market value.

Q. Were you told the residue was offered to scrap dealers? A. Yes.

Q. And you were told no bids came on this and this was residue?

A. I don't know whether I was told no bids or not, but I was told it was residue.

Q. Did you have any idea what the value of the goods was at that [85] time, other than that it had a substantial value but of an unknown quantity?

Mr. Harr: Your Honor, I would like to call attention to the fact that we agree that they knew that—it was in the pre-trial order—and at the time of the sale—I will read the brief. He says, "That both defendant and plaintiff's representative at the

(Testimony of Herbert A. Jones.)

time of the sale were fully familiar with the nature, use and value at that time."

Mr. Tongue: Yes, you people say yourselves you don't know what it is worth excepting that it had some substantial value, and that is what we say. We don't know exactly what it was worth, a substantial value, but we didn't know what it was; it was purely speculative as I understand it.

Q. Did you think you would be able to sell these goods for anything other than scrap?

A. Well, I didn't know at the time what the present demand was. That was what limited whether I could sell them or not.

Q. Yes.

A. If there was no demand, I had to sell them for scrap.

Q. Now, what did Mr. Webb do after that conversation that you had with him—First, let me ask if anything else was said between you and Mr. Webb?

A. I don't believe so.

Q. What happened then?

A. Well, Mr. Webb was pretty busy right then; he had several [86] things to take care of, and he told me I would have to go to Mr. Burgoyne. So Mr. Burgoyne was to the next desk to him, so he turned in his receipt and gave Mr. Burgoyne the papers and I went over and saw him.

Q. What did Mr. Burgoyne say?

A. Well, he talked to me some about the universals and everything that was on there and just where I could probably sell them, something that

(Testimony of Herbert A. Jones.)

I was getting a good buy for my money, that they had been laying around there for quite a while and they wanted to get rid of them.

Q. What was that?

A. That they had been laying around there for quite a while and they wanted to get rid of them.

Q. Did he tell you where the joints were?

A. Well, I could read where the joints were. It was written on there "Oregon Shipyards."

Q. And he showed you that description contained in the Special Offering, is that right?

A. Yes.

The Court: Where is your home?

A. 3024 Northeast Fifteenth.

Mr. Tongue: Q. Did he give you any sales talk on this thing?

A. Well, some, yes. He told me approximately where—He just more or less, I think, was talking about where I might be able to sell them. He wasn't sure. [87]

Q. Did he tell you he thought this was a bargain for you?

A. Yes, he told me probably I would sure get my money back out of them.

Q. Did he tell you what the price was?

A. No.

Q. I mean what the Government would sell it to you for? A. Yes, he told me \$75.00.

Q. So, as far as you know, was that anything other than the price the Government had fixed on those goods?

(Testimony of Herbert A. Jones.)

A. No. It was a fixed price as far as I knew.

Q. Now, Mr. Jones, what did you then tell Mr. Burgoyne?

A. Well, I don't know other than that I told him I would accept the sale, I would buy the gears.

Q. Did you give him a check?

A. Yes, I gave him a check.

Q. What did he do then?

A. Well, he took, said he had to get the sale approved, Mr. Zanon's desk, I think, was in the corner at that time, and he took the papers and went over to Mr. Zanon.

Q. Did you see him do that? A. Yes.

Q. Did he come back later?

A. Yes, he wasn't there but a few seconds.

Q. Did he say that Mr. Zanon had approved the sale?

A. No, he didn't say, but he told me that the receipt and everything [88] would be mailed to me.

Q. And did he say that the sales documents would be mailed to you?

A. He didn't say, but they were.

Q. And that was on October 30th, as I understand it, in 1946, is that correct?

A. Well, I can't remember the date, but that was right close to it.

Q. About when did you receive the sales documents? A. Oh, I imagine about a week later.

Q. Would it be about the 5th of November?

A. That is about right.

Mr. Tongue: May it be understood that these

(Testimony of Herbert A. Jones.)

same exhibits we have marked are also in evidence subject to objection?

Q. And you received a receipt for your check at that time, is that correct?

A. Yes. It was mailed to me.

Q. What did you do then?

A. Well, I waited—I was told when I went up there I would have to wait a few days after I got the sales documents before I could pick up the equipment I purchased.

Q. So what did you do?

A. So I think I waited until, it seems to me I waited until Saturday, and started to pick some of the stuff up. It was shortly after that, though. I waited a couple of days. [89]

Q. Did you then go and pick up some of the items that you were sold?

A. Yes, I picked up—I was told that—I didn't want the chess wagons, but I was told that if I didn't pick them up they would ship them to me and charge me the freight on them, so I went down and picked them up.

Q. And you picked up various of the other items, did you?

A. Yes, I picked up all the other items.

Q. Did you go out to the Oregon Shipyard to pick up these gear joints? A. Yes.

Q. And what happened when you arrived there?

A. Well, they delivered the miter gears to me, which were at the same shipyard.

(Testimony of Herbert A. Jones.)

Q. Were those miter gears part of the same sale?

A. Part of the same sale, yes. And the guard, I had to get the papers before I could get delivery on it, and I couldn't get the papers on it because Mr. Gibson seems to have tied them up.

Q. Who is Mr. Gibson?

A. He was the big boss out there.

Q. I see. So you weren't able to take delivery on the gear joints on that day, is that correct?

A. No.

Q. Did you go back later to try to get delivery on them? [90]

A. Yes, I went back several times.

Q. The next time you went back did you see Mr. Gibson?

A. I believe I did. I know he stalled me off for a long time, wouldn't hardly see me, so I finally, I just waited for him until he got ready to see me.

Q. And what did he tell you?

A. Well, he asked me if I knew what the universals were worth.

Q. What did you say?

A. And I told him that I knew they were worth more than I paid for them or I wouldn't have bought them.

Q. What did he say then? Did he tell you what they cost the Government?

A. Yes, he told me, he said the scrap value, he said the scrap value is worth about \$2,200, and he told me that the cost of them was around \$66,000.

(Testimony of Herbert A. Jones.)

Q. Prior to that time did you have any information that that was the cost to the Government of those gears?

A. Not as to the cost to the Government, no.

Q. That was the first time you were apprised of the cost to the Government of those gears?

A. That is right.

Q. And what else did he say to you? Did he say that the gears had been withdrawn?

A. Yes, he told me that he had a wire from Oakland to withdraw the gears. [91]

Q. From whom in Oakland? From the Maritime Commission?

A. From the Maritime Commission. I am trying to think of the guy's name—Hull, I think he said.

Q. What did you do then?

A. Well, I found out I couldn't get them, and he told me I would have to go back and talk to Bob Strong—that is the man at War Assets—and he blamed it all on them, said they were the ones that wouldn't deliver the universals.

Q. What did you do then? Did you go over to War Assets? A. I went back to War Assets.

Q. To whom did you talk to?

A. Well, I talked to Bob Strong.

Q. Did you talk to Mr. Zanon then?

A. I talked to Mr. Zanon, yes.

Q. Had you ever talked to Mr. Zanon before?

A. I don't believe I had ever talked to him before.

Q. That was the first time you ever met Mr.

(Testimony of Herbert A. Jones.)

Zanon, is that right? A. I think so.

Q. And Mr. Zanon has testified that you told him that you had bought \$60,000 worth of gears and you wanted delivery on them, is that what you said?

A. Well, I think that is what I said, because Mr. Gibson told me that is what they were worth.

Q. Had you known they were worth \$60,000, or cost the Government that, before you saw Mr. Gibson? [92]

A. No, I didn't know. I knew they cost the Government considerably more than I paid for them, but I didn't know whether they had any use for them. That was my impression, that they didn't have any use, that is why they sold them.

Q. Did Mr. Zanon claim any mistake had been made? A. No.

Q. Did he claim there was any lack of authority to make the sale? A. No.

Q. Did he claim that you were not in good faith?
A. No.

Q. He just told you that the sale was off, is that right?

A. Well, Mr. Zanon I don't believe was the one that said the sale was off. He just told me he couldn't do anything about it.

Q. Did you talk to anyone else at War Assets?

A. I talked to Mr. Stocklen, the attorney there.

Q. Did Mr. Zanon refer you to him?

A. Yes.

Q. What did Mr. Stocklen tell you?

(Testimony of Herbert A. Jones.)

A. He told me that he knew no way for me to get the universals.

Q. Did he say why the sale was called off?

A. No, but he said that there was an inadequate payment of the purchase price.

Q. I see.

A. And that I would have to go through the Court of Appeals in [93] New York to get the universals.

Q. What did you do then, Mr. Jones?

A. I went out to Hillsboro to see Mr. Bush.

Q. Did you talk to any other attorney before that?

A. I talked to Mr. Harr, Mr. Harr up here in the U. S. Attorney's office.

Q. Did you tell him the story?

A. Well, fairly well. I imagine I told him the biggest part of it.

Q. And I suppose he told you that the U. S. Attorney's office couldn't help you?

A. Well, he told me that they couldn't help me and that they would probably be called upon to defend the case if it came up.

Q. So then you referred to Mr. Bush?

A. Yes, that is right. I went to see Mr. Bush.

Q. What legal steps were taken following that, Mr. Jones?

A. Well, we filed suit shortly after that in the State Court against Mr. Mudge and Mr. Gibson for replevin.

Q. Trying to get the goods back?

(Testimony of Herbert A. Jones.)

A. Trying to get the goods back.

Q. What happened then?

A. Well, we got as far as our depositions, and got the depositions taken, and then they moved the goods over to Vancouver to get it out of State Court jurisdiction, I guess.

Q. Did you make anybody else a party to that case at that time? [94]

Mr. Harr: Your Honor, I don't see the materiality of this. It is going a little afield.

Mr. Tongue: This is a suit in equity, and the clean hands of the Government is material. They are asking to rescind.

Mr. Harr: We agreed to abate that action over then pending action here, and as to moving of these goods, counsel in their complaint asked for alternative damages.

Mr. Tongue: Well, so far as that is concerned,—

Mr. Harr: I don't get the materiality as to how it applies to this case, your Honor.

Mr. Tongue: I have nothing further to say, your Honor. I think it is material on the reason I have stated.

The Court: Sustained.

Mr. Tongue: Now, Mr. Jones, when was the first time that you were told that the Government challenged your good faith in this matter?

A. Well, not till just recently.

Q. In the last two or three weeks?

A. The last two or three weeks, that is right.

(Testimony of Herbert A. Jones.)

Q. Did they ever make any claim upon you before that you were in other than good faith?

A. 'No.

Q. Before that time did they ever make any claim that they didn't have the authority to sell these goods to you?

A. No. I figured out that that is what War Assets was set up [95] for, to sell, and I didn't know the price that each man was allowed to sell for.

Mr. Tongue: That is all.

Cross-Examination

By Mr. Harr:

Q. Well, now, you were in our office about three weeks ago, at the time of the first pre-trial conference, weren't you? A. Yes.

Q. At that time you told us that you had full knowledge of the use of these gears, the value, and that you worked in a shipyard and that is how come you knew, and that is what you said in our office, did you not, in my office?

A. I agree that I knew what their use was, yes.

Q. And the reason you knew was you had been in a shipyard? A. That is right.

Q. You had seen them and used them?

A. I installed them, yes, but I knew that they weren't manufactured very cheaply because of their nature.

Q. Now, you said also, you have testified, that it wasn't until just three or four days ago that you were notified that the Government was going to try

(Testimony of Herbert A. Jones.)

to rescind, not try to rescind but that they had no authority; let's put it this way.

A. Just a few days ago that they told me.

Q. You testified it was only two or three, three or four days ago the Government first notified you, the first notification [96] you had that they had no authority?

A. That is right, that they had no authority to make the sale.

Q. Did your attorney, Mr. Bush, tell you that on December 4, 1946, he received a letter from Mr. Mudge?

A. I believe he did, yes.

Q. Did he tell you there that the contents of the letter—I will quote it in part, "As a result we shall have no choice except upon receipt of this document to cancel the order of Mr. Jones, and we anticipate he will then enter a claim for the return of the money paid, which claim will be handled promptly." Did he tell you that?

A. He said they would anticipate it, yes, but I never did ask for the money.

Q. Well, didn't he tell you that Mr. Mudge at that time, as early as December 4 of 1946, wrote you that they had no authority to make the sale?

Mr. Tongue: That letter speaks for itself.

Mr. Harr: Just a moment. I am asking your——

Q. Is that correct?

A. No, I don't remember that he told me they had no authority to make the sale or not.

Q. Did he say here, "It would appear, Mr. Bush, that someone in the office erred in classifying the

(Testimony of Herbert A. Jones.)

material in question, namely, universal gear joints as automotive equipment. This, I understand, is a Maritime commodity and if this is the case it [97] should not have been offered by the automotive section." Did Mr. Bush tell you that?

A. Well, that was what was in the letter, yes.

Q. Did Mr. Bush tell you that? A. Yes.

Q. Well, then, you knew that back in December of 1946, that they were telling you that they had no authority to sell this.

Mr. Tongue: That calls for a conclusion.

A. No, they told me that was the automotive section, but they told me before that was the machinery section.

Mr. Harr: Q. But you testified that it wasn't until four days ago that you learned for the first time that they claimed they had no authority.

Mr. Tongue: Your Honor, this is——

Mr. Harr: Just a moment. Let me——

Q. Is that your testimony?

A. That is right.

Mr. Tongue: Your Honor, may I interrupt at this moment. The only grounds stated on this letter for the attempt to cancel the sale was that a mistake was made in classifying this as automotive equipment and that the Maritime Commission had withdrawn the goods. They never claimed in this letter that there was any lack of authority or that any other mistake had been made, and they never challenged his good faith in that letter. I think it is unfair to question him about it this way. [98]

(Testimony of Herbert A. Jones.)

The Court: You can put the letter in.

Mr. Tongue: It is already in.

Mr. Harr: Q. Now, did you say that Mr. Burgoyne took the check, your check, over to Mr. Zanon to be okehed? A. No, not the check, no.

Q. It was the inter-office sales document that they prepared?

A. Well, I don't know which document it was. I know he took some document.

Q. Well, they prepared a document while you were sitting there?

A. They didn't write it up. They took the Special Offering, I think it was.

Q. Some document; you don't know what it was?

A. Yes, that is right.

Q. You took the cash to the cashier, didn't you?

A. Yes.

Q. In fact, you didn't take it that day, did you?

A. Well, I don't even know whether I took it to the cashier or not, but I gave it to somebody to take to the cashier and they told me a receipt would be mailed, and I knew the check was good because it was a cashier's check and there wasn't any question about questioning it.

Q. That cashier's check in the amount of \$75.00?

A. That is right.

Q. And do you say that you had found that out over the telephone that they would accept \$75.00?

A. That is right.

Q. And that was for the residue?

A. That is right.

(Testimony of Herbert A. Jones.)

Q. And then you came down and talked to Mr. Webb and Mr. Burgoyne, is that right?

A. That is right.

Q. Did you tell Mr. Webb that you would buy it?

A. I believe I did. I think that is why he referred me to Mr. Burgoyne.

Q. That was before you were referred to Mr. Burgoyne? A. That is right.

Q. And then did you—And he told you that he had no authority to sell? A. No, he—

Q. That he had to have Mr. Burgoyne complete the deal?

A. He didn't tell me anything. He said he had some other customers waiting, said I had to step over to Mr. Burgoyne, didn't tell me why.

Q. He didn't tell you Mr. Burgoyne would have to complete the sale?

A. He told me Mr. Burgoyne would complete it, not that he had to.

Q. And you indicate now that Mr. Burgoyne, after you told him you would buy it, that he gave you a sales talk?

A. That is right. He was telling me where I could get rid of [100] everything.

After you had told him you would buy it then he volunteered the other information?

A. That is right.

Q. And he said it had been lying around there for a long time and he would like to get rid of it?

A. He said it had been lying around there quite a while cluttering up his desk, is what he said.

(Testimony of Herbert A. Jones.)

Q. Now, you got regularly in the mail these offerings; you put your name on record?

A. Up till the time of this sale.

Q. And you had Special Offering C-286, didn't you?

A. I imagine I did. I don't know—I learned of the sale through the mail, I think.

Q. Now, then, you knew that the bids, that they advertised that for bids, and it was advertised on about October 4, and they said bids would be received until 2:00 o'clock p.m., October 22?

A. Well, the only thing I got, the only time I ever got anything from bids, was from Fort Stevens.

Q. So, between October 22 and the date you went there, about October the 30th, the gears had been lying there then for about eight days; that would be right, wouldn't it?

A. That is right.

Q. So that is what Mr. Burgoyne meant when he said, "had been lying around there for a long time"? [101]

A. That is right—I guess so.

Q. Now, you testified that up till the time you went over to the Maritime Commission seeking delivery, that was the first time that you knew what the gears had cost the Government, that is your testimony?

A. That is right. I knew what they were used for, but I didn't know what they cost the Government.

Q. Did you know what they would cost anyone else?

(Testimony of Herbert A. Jones.)

A. No, I didn't know until I saw a catalog on the gears.

Q. Where did you see the catalog?

A. Well, M & M Machinery Supply mailed it to me.

Q. Where is that?

A. I think Camden, New Jersey.

Q. I beg your pardon?

A. I think their outfit was in Camden, New Jersey.

Q. I know, but where did you see the catalog?

A. After I got it out of the mail.

Q. Where? A. At my home, I guess.

Q. Did you send for it?

A. No, I don't believe I did.

Q. A catalog advertising these gears came to your house?

A. It was just kind of a circular catalog.

Q. Was that after this sale?

A. Quite a while, yes. [102]

Q. About how long after the sale?

A. Oh, I don't know; it was several months after the sale.

Q. Was that before or after you went to the Maritime yard? A. That was after.

Q. That was the first information you had on the value, then, is when they told you at the yard?

A. That is where I found out what they were getting for them. I knew they were worth money, yes, but I didn't know they were worth anything besides the scrap value.

(Testimony of Herbert A. Jones.)

Q. Well, you said they were worth money. What was your idea of money?

A. Well, whatever I could get out of them.

Q. Well, five cents would be money. What do you think about money, whatever you would get out of them?

A. Well, the scrap value is worth something, was worth more than I paid for them.

Q. Well, you knew when you were working for the shipyards that some of those gears were 90 per cent brass or more? A. That is right.

Q. You knew that and you knew how heavy they were? A. Approximately, yes.

Q. And you knew what brass was worth?

A. Yes, fairly close.

Q. So you could figure that in your mind, couldn't you? A. That is right. [103]

Q. So you knew when you were buying those gears they would be a scrap value over two or three thousand dollars; you knew that, didn't you?

A. Well, I didn't know at the time that they would weigh 24½ ton.

Q. Well, when did you come to a realization as to what those gears would be worth as scrap?

A. When Mr. Gibson told me what they would be worth. He told me how much weight there was there.

Q. He told you \$2,000.

A. He told me approximately \$2,000.

Q. In your pleadings that you filed over in the State Court in March this year you set forth the

(Testimony of Herbert A. Jones.)

scrap value was \$6,000. Did you compute that yourself, or had scrap gone up that much in that period of time?

A. Well, I think that was taken from the total weight. Now, I don't know—The total weight figures in the amount of steel in it, too.

Q. But you knew at least that they would be at the time of this sale, you knew they would be worth several thousand dollars, didn't you?

A. I didn't stop to think what they would be worth in scrap, no.

Q. Well, when you had received your Special Offering C-286 did you——

Mr. Tongue: He said he didn't receive it. [104]

Mr. Harr: Q. ——did you know the gears were for sale?

Mr. Tongue: Just a moment. He said he didn't receive that offering.

Mr. Harr: Q. Did you know those gears were for sale along with this other residue when you were talking over the phone, and these various other conversations you had?

A. When I talked to them over the phone—I knew they were for sale because I went up there one time and saw the list and I talked to them over the phone later on, mostly after they came down. They had been too high for me at first and I couldn't handle it at that time.

Q. How many times do you maintain you saw Mr. Webb?

(Testimony of Herbert A. Jones.)

A. Oh, I don't know exactly. I probably saw him two or three times.

Q. Was that when you were purchasing other materials over there?

A. Yes, quite a bit of the time, yes.

Q. Well, had you ever talked to him before this one occasion?

A. I talked to him about a larger engine, yes. I wanted a large engine, a Diesel engine.

Q. A Diesel engine? A. Yes.

Q. But that time and the time you talked to him about the Jeep motors, are those the only two items, or did you have other conversations with him?

A. Well, I talked to most everybody in that section several [105] times. I went over there quite often, every time I found out about a sale.

Q. Who quoted you a price of \$900 to \$1,000? Mr. Webb quoted you that price?

A. I don't remember who it was that quoted me the price, no, but they told me that the price was on it.

Q. How long before the date of the sale was that price quoted to you?

A. Oh, approximately ten days, a week or ten days.

Q. Could it have been more than that or less than that?

A. That was the first time, you say? It could have been more than that, yes.

Q. And then how many days later was it you came down and they quoted you another price?

(Testimony of Herbert A. Jones.)

A. Well, it was shortly, a few days before I actually bought the material; I don't remember just how many days it was, no.

Q. And then you called them up once in between there?

A. That is right. I think the second time, the time that I got a lower price on it, I mean they told me a lower price of two hundred some odd dollars was when I called them up.

Q. Well, when did you learn it was \$75.00?

A. The last time I went down there.

Q. That is when you went down there. How did you happen to have a cashier's check for \$75.00 if you already—How did you already know it was \$75.00? [106]

A. They called me. They told me—I called them on the phone and they told me it had come down to \$75.00, so I said I'd take it.

Q. Did you call them or did they call you?

A. They called me—No, I called them.

Q. And how long was that before the 30th of October that you got that telephone call or you called them?

A. Well, I think it was right close to the date I bought it if it wasn't the same day. I think it was the same day.

Q. So you think that between the first time you talked about this residue and the date of the sale was about ten days? A. Probably, yes.

Q. Did you have any idea who that was you

(Testimony of Herbert A. Jones.)

talked to—Did you call for anyone in particular when you telephoned in?

A. No; the person answered the phone I guess was the operator, and she asked me, I think she told me, "War Assets Administration" and I think I said, "May I speak to the Machinery Division?" and that is the division she gave me. I don't know who it was I talked to.

Q. And you had called frequently before that, had you not?

A. Why, yes, I called every time I thought I could buy something, every time I had a little extra money.

Q. You didn't go down to the yards and look these particular gears over yourself?

A. Yes, later on. [107]

Q. Later on, not before?

A. Not before, no.

Q. You didn't tell them that you knew, that you worked in the shipyard, did you?

A. No, I didn't tell them I worked in the shipyards.

Q. You didn't tell them that you knew the value of them, did you?

A. No, because I didn't actually know what I could get out of them.

Q. Beg pardon?

A. I said I didn't know what I could get out of them. That was the value as far as I was concerned at the time.

Q. But you didn't tell them you knew what type

(Testimony of Herbert A. Jones.)

of gears these were, that they had a lot of bronze and knew the value?

A. No, there was no reason to tell them I knew they had a lot of bronze on them.

Q. Did they tell you why they were classed in the automotive section? A. No.

Q. You knew that they were marine equipment, didn't you?

A. I knew they were marine equipment, yes, but that was not only the automotive, it was machinery. They had other things there, too. I knew some of the other stuff wasn't marine, and it was evident on the same sale that there was stuff that was, like those "Main" circulating pumps. Now, no automobile has a [108] "Main" circulating pump on it.

Q. "Main" circulating pump, you say?

A. That is what it said.

Mr. Harr: I think that is all.

Redirect Examination

By Mr. Tongue:

Q. Mr. Jones, when you talked with Mr. Burgoyne and Mr. Webb, concerning those conversations, you have been asked whether you told them that you knew these were marine joints. At that time did Mr. Webb or Mr. Burgoyne have in their hands the description of these goods?

A. That is right, that is what I bought them from, the description of the goods.

Q. And did Mr. Burgoyne tell you what you might do with these universal joints?

(Testimony of Herbert A. Jones.)

Mr. Harr: I think that has been gone into on direct examination.

Mr. Tongue: No. I have one point that wasn't gone into.

A. I think he told me that I might be able to sell them in the East where some shipyards were still operating.

Q. You recall that? A. Yes.

Q. Now, you were told by Mr. Bush that he had received this letter that counsel has called your attention to? A. That is right. [109]

Q. After Mr. Bush told you about the receipt of that letter did the Government make any attempt to get back any of these goods that had been delivered to you? A. No, I don't believe so.

Q. Did they ever tender to you any money and ask you to return those goods to them?

A. No.

Q. Now, when you——

A. In fact, the first time I knew they would tender me any money is when they filed this suit against me to rescind the contract. I didn't know until that time they would even give me the money back.

Q. Now, Mr. Jones, there has been a good deal about the value of these goods. You have testified that you didn't know what the scrap value was until you talked to Mr. Gibson; is that correct?

A. That is right.

Q. And that was when you learned the weight of the goods, is that right?

A. Yes—Well, Mr. Gibson didn't even know the

(Testimony of Herbert A. Jones.)

weight of them until he sent some man down to weigh them.

Q. I see. Did you know at that time that you would have to take apart these joints in order to sell them for scrap?

A. That is right. You have to separate the brass from the steel. [110]

Q. Now, you have been asked about a figure in your amended complaint in the State Court giving a value of some \$31,000 for these joints.

The Court: \$6,000.

Mr. Tongue: I beg your pardon?

The Court: He said \$6,000.

Mr. Tongue: I think it was \$6,000 for scrap and \$31,000 retail were the figures in that complaint.

Q. Was that the amended complaint that was filed in that case, do you know?

A. I believe it was. I can't be sure about it.

Q. In the original complaint was any figure given by you as to the value of those joints?

A. I don't believe so.

Q. Was it only on motion of the Government that you were required to give a value on those goods?

A. I believe that is right.

Q. And how did you determine the thirty-odd thousand dollar figure?

A. By what they were selling for in that catalog—I don't know whether they were selling, but they were advertised.

Q. That was the retail price in that catalog?

(Testimony of Herbert A. Jones.)

A. They had them advertised for. I don't know whether they were selling any or not.

Q. That catalog you received about a month or so after the sale, [111] is that right?

A. Well, I don't know whether it was a month, but probably along in January some time.

Mr. Tongue: That is all.

Mr. Harr: Just a moment. I have a question or two.

Recross-Examination

By Mr. Harr:

Q. You said you didn't know until we filed a suit that we would offer a refund?

A. That is right.

Q. Isn't it a fact that Mr. Mudge in writing to Mr. Bush said that if you made application for a refund it would be promptly handled? Is that right?

A. I think——

Q. December, 1946.

A. I think the letter said that a claim would be promptly handled.

Mr. Tongue: This letter speaks for itself.

A. If I would make some kind of claim—I don't remember the words in it.

Mr. Harr: Q. That it would be handled promptly. I think that is all.

Mr. Tongue: Just one question. [112]

Redirect Examination

By Mr. Tongue:

Q. They told you if you would make a claim you

(Testimony of Herbert A. Jones.)

could get your money back, is that what they told you in that letter? A. I believe.

Q. Did they ever come to you and make a tender of money? A. No.

Mr. Tongue: That is all.

(Witness excused.)

Mr. Tongue: There is some controversy as to the correctness of an exhibit. I think we can settle it after the trial, your Honor, without taking the time now. Mr. Anderson. [113]

RUSSELL D. ANDERSON

was thereupon produced as a witness in behalf of defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tongue:

Q. Mr. Anderson, did you go with Mr. Jones when he went to buy this residue in controversy here? A. I did.

Q. Were you with him when he was referred to Mr. Webb? A. Yes.

Q. Did Mr. Webb show him the written description and specifications of these items?

A. I don't remember whether he showed them to him or not. I am pretty sure he did.

Q. Was there any discussion of the gear joints at that time? A. None that I remember, no.

Q. Did you see any description of the various items at that time?

(Testimony of Russell D. Anderson.)

A. I looked through it, yes.

Q. I hand you this document marked Pre-Trial Exhibit 1 and ask you if that, or in substance, that description was what you saw at that time?

A. It was a sheet something like this.

Q. Yes. Just described the goods, is that what it did? A. Yes. [114]

Q. Did it show any prices or cost figures on it?

A. No prices whatsoever other than the fixed price of \$75.00.

Q. Were you with Mr. Jones when he was referred to Mr. Burgoyne? A. Yes.

Q. Do you recall what was said at that time?

A. Well, I don't know. We just went over to Mr. Burgoyne, and Mr. Burgoyne had a listing of it and thumbed through it and looked it over and said that he thought it was a good buy, probably get more out of it than he paid for it.

Q. Did you hear Mr. Burgoyne tell Mr. Jones anything about these gear joints or what might be done with them?

A. Not that I remember, no.

Q. Did he tell Mr. Jones what he might do with some of these items to dispose of them?

A. He said some of it you could sell, the automotive, here and there, hardware around, heavy machinery—He didn't specify any certain place, no.

Q. Did he tell Mr. Jones that this was a residue on which no bid had been received?

A. That is right, said it had been around for a

(Testimony of Russell D. Anderson.)

few days and he wanted to get rid of it, said he had to get rid of it.

Q. Did he set the price, or did Mr. Jones make an offer as to the price?

A. The price was set at \$75.00.

Q. By whom? [115]

A. I don't know who set it. He said it was higher and had been dropped down.

Q. Who said that? A. Mr. Burgoyne.

Q. Were you with Mr. Jones when he went out to the Maritime Commission yard to—or to the Oregon Shipyard—to pick up these gears?


A. Yes.

Mr. Harr: We admit, your Honor, that delivery was denied.

Mr. Tongue: Well, I want to develop something further here.

The Court: What?

Mr. Tongue: One of the claims that has been made by counsel is that Jones said that he knew this stuff cost the Government \$60,000, and we want to develop when he was first apprised of that fact, and I would like to corroborate Mr. Jones' testimony on that point.

Mr. Harr: The defendant would be the only one that knows that, and if he says it is at the Maritime Yard that he found they cost that we will admit that. 

Mr. Tongue: No further questions.

Mr. Harr: No cross-examination.

(Witness excused.)

Mr. Tongue: Mr. Mudge.

C. T. MUDGE

Regional Director of War Assets Administration, was thereupon produced as a witness in behalf of defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

Mr. Tongue: Let the record show that this witness is examined as an adverse witness. He is Regional Director of War Assets Administration.

Q. You are Mr. C. T. Mudge?

A. Right.

Q. And you are Regional Director of the War Assets Administration?

A. The Portland Region.

Q. When did you first learn of this sale to Mr. Jones? A. Mr. Tongue, I don't know.

Mr. Tongue: May I approach the witness?

The Court: Yes.

Mr. Tongue: Q. I hand you this document marked Pre-Trial Exhibit 18, a letter signed by you to Mr. Bush.

A. Yes, I recall receiving a letter from Mr. Bush, but whether I knew about the case before or not, I can't answer.

Q. Is this your signature? A. Yes. [117]

Q. And you say you delayed answer because of the fact that the writer wanted complete information on the Jones matter? A. Correct.

Q. So that when you wrote this letter you did have complete information on the Jones matter, is that right? A. Correct.

(Testimony of C. T. Mudge.)

Q. What was the original reason for refusing delivery of these joints to Mr. Jones?

A. I think, if I recall, the original reason for refusing delivery was the receipt in our office of a TWX from Maritime stating that they were being withdrawn.

Q. Did they give any reason for withdrawing the goods?

A. I don't recall that. I don't remember seeing the TWX. Somebody must have told me about it.

Q. Did they ever before withdraw goods after sales documents had been issued?

A. That I can't answer.

Q. Had delivery ever before been refused for any reason after sales documents had been issued?

A. That I can't answer either, except by hearsay.

Q. Now, originally was there any question as to the legal authority of the War Assets Administration to make this sale?

A. Was there any legal——

Q. Any question as to the authority to make this sale?

A. A question as to the authority of War Assets to make the [118] sale of properly declared war surplus assets?

Q. What I am asking is this, Mr. Mudge: Originally and at the time you wrote this letter was there any question in your mind as to whether this sale exceeded the authority of the War Assets Administration and its representatives?

A. Well, I'd like to answer that, but I didn't

(Testimony of C. T. Mudge.)

see the sales documents on the case and I didn't know about it except by hearsay, comment about the office.

Q. To refresh your recollection, Mr. Mudge, I will call your attention to the deposition taken in the—I don't have the date on which it was taken, but you will recall the incident, I think,—

A. Yes.

Q. —in which you were asked this question:

“Question: Does that authority include the power to approve or disapprove such sales?”

“Answer: Within the specified policy limits, yes.

“Question: Can you briefly state what those limits are, Mr. Mudge?”

“Answer: I can't, no, not without reference to the delegations of authority.

“Question: Are those limits involved in this case, Mr. Mudge?”

“Answer: No, no; this is within the limits of [119] the Regional Office's authority, yes.”

Do you recall that now?

A. Yes, that is true.

Q. And do you also recall that at the time of that deposition, whether you were asked this question: “Is there any question as to the authority of the person who fixed the price of these goods?”

“Answer: No, I think not.”

A. To fix a price for goods?

Q. To fix the price for these goods?

(Testimony of C. T. Mudge.)

A. Well, I must have misunderstood the question, then.

Q. Now, originally, was there any question as to the complete good faith of Mr. Jones in this case?

A. I don't—Not to my personal knowledge.

Q. This deposition was taken after you wrote this letter, was it not? A. Yes.

Q. In which you purported to have complete information, and I call your attention to the fact that in this deposition you were asked this question: "Is there any question in your mind as to the good faith of Mr. Jones in this matter?"

"Answer: No, not that I know of. He was looking for a bargain, perhaps."

A. That would be true.

Q. Now, originally was there any part of this sale questioned [120] other than the gear joints themselves?

A. Not so far as I was concerned.

Q. What was that?

A. Not so far as I was concerned. I didn't know anything about the programs.

Q. Do you know what these goods are worth.

A. Do I? No.

Q. In that connection, do you also recall in this deposition that you were asked——

The Court: He doesn't know. What are you going to show?

Mr. Tongue: Very well. The deposition is in evidence.

(Testimony of C. T. Mudge.)

Q. Now, were the goods ever actually withdrawn by the Maritime Commission?

A. I don't think so. Whether they followed up with a withdrawal or not—That would have gone through the Acquisition Department.

Q. So far as you know, they were left with War Assets Administration? A. So far as I know.

Q. Mr. Mudge, were you served with a subpoena to produce certain records? A. I was, yes.

Q. Have you produced those?

A. I can't produce them. They have been sent to Washington by the GAO.

Q. Do you have any documents in your files that show the cost [121] price and the sales price for the transactions called for in those documents?

A. Are you talking about the first subpoena or——

Q. Both of them.

A. The WAA2s we don't have, but the WAA1s are in the files but are sealed for shipment to San Francisco.

Q. Would WAA1s show the cost price?

A. That I don't know.

Q. In any event, you have gone through your files and you can't produce this information?

A. I have asked somebody to do it, Yes.

Q. Yes, I can understand that.

Mr. Tongue: I think that is all.

Cross-Examination

By Mr. Harr:

Q. Mr. Mudge, in response to a question by coun-

(Testimony of C. T. Mudge.)

sel pertaining to that deposition that was taken, I think you had an explanation to make with reference to authority, the agents having authority to fix a price, and you answered, "I must have misunderstood the question." Do you have an explanation of that?

A. Well, we have a pricing section that normally has authority to fix prices on almost anything that is priceable.

Q. And is that what you thought he had reference to?

A. That is what I thought he meant, the pricing division and the operation of that division. [122]

Q. At that time, the time of this sale in October, 1946, I will ask you whether anyone besides yourself had authority to make a negotiated sale?

A. No.

Q. Then, of the entire organization there, this particular equipment as it was listed, you were the only one that had authority to make that sale?

A. Only the final authority. At that time we were discouraged in the making of negotiated sales and the negotiated sale procedure was hemmed in with countless regulations. It had to pass through the Regional Review Board and Board of Allocation Awards, and so forth, and finally comes up to the Regional Director for final approval.

Mr. Harr: I think that is all.

Mr. Tongue: No further questions.

(Witness excused.)

Mr. Tongue: Now, the only other witness I have, your Honor, is one who would testify as a dealer in industrial supplies and equipment and who has himself purchased similar equipment, and we are prepared to offer through him testimony of the custom and practice. If your Honor doesn't want to admit that, and I gather from what you said you don't think it is material——

The Court: Well——

Mr. Tongue: May I make an offer of proof at this time? [123]

The Court: Yes.

Mr. Tongue: We offer witness John K. Paulson, who is a dealer in industrial supplies and equipment, and represents that if allowed he would testify that the approximate percentage of the sales price to him as compared to the original cost price to the Government of the supplies and equipment that he has purchased from the War Assets Administration has ranged from one-half of one per cent to 100 per cent, and that the range will depend on whether the goods that are sold have some standard use or whether they just have a special use and couldn't be resold except for scrap, and he would also testify, if allowed, that it was the practice of the War Assets Administration when goods are left as a residue, when they have been offered for bid and no bids have been received, to offer those goods for sale at the highest possible price in order to get rid of them at the earliest possible date; and he would also testify that he has never heard of any attempt to cancel any sale after the sales documents

have been issued, whether on the basis of mistake, lack of authority, or otherwise.

The Court: You could show the first two parts of it, but not that last.

Mr. Tongue: Would counsel stipulate he would so testify if offered as a witness?

Mr. Harr: No, I think we should have the testimony, because we will have some to refute. [124]

Mr. Tongue: Very well. Call Mr. Paulson.

JOHN K. PAULSON

was thereupon produced as a witness in behalf of defendant and, having been first duly sworn, was examined and testified as follows:

Mr. Tongue: In that connection, your Honor, and in considering the testimony of this witness, I would like to call attention to the fact that we attempted to subpoena from Mr. Mudge—and I can understand his difficulty—the records of the sales to the big four junk dealers in the Portland area during this same period, because we felt that that would show sales on a similarly small fraction of original cost.

Mr. Harr: Your Honor, with reference to those subpoenaed records, that subpoena, I think, was issued Friday and delivered Saturday, and we had no opportunity, and it would require a number of days to, or maybe weeks, to get that information.

Mr. Tongue: I can understand the situation, although my information is that there are not a great many sales to each of those dealers during that period of time, but I can understand the problem.

(Testimony of John K. Paulson.)

Direct Examination

By Mr. Tongue:

Q. Mr. Paulson, what is your occupation?

A. I am a dealer in industrial supplies and equipment.

Q. Have you made any purchases of supplies and equipment from [125] the War Assets Administration?

A. Yes, for about two years.

Q. Approximately how many purchases have you made over that period of time? Do you have any idea?

A. Oh, probably two hundred.

Q. Now, of those sales, purchases by you from the War Assets Administration, what would be the range, comparing the original cost to the Government with the price that you were required to pay to the War Assets Administration?

Mr. Harr: I am going to object to this testimony, your Honor. It doesn't tend to prove or disprove any of the issues in this case, is immaterial, and, another thing, that if it is proved that there were other sales that were ultra vires wouldn't be a defense in this case, or the fact that another sale was illegal that this sale should be declared legal. It is our duty to see that all sales are proper.

The Court: He is just showing that it isn't scandalous to buy something for one-thirtieth of its value.

Mr. Tongue: It goes to the question of good faith, also.

The Court: I know that: It bears on the legality or ultra vires.

(Testimony of John K. Paulson.)

Mr. Tongue: You may answer.

A. It varies, oh, I'd say from one-half of one per cent to 150 per cent.

Q. What will determine the range in those figures in percentages? [126]

A. Anyone buying surplus looks first not to the cost, the acquisition cost, but to the salability of the article. There were so many things which were made for some specific purpose during the war, for a shipyard or for an Army vehicle, for which there would be no sale now. If you are buying something like that, well, you can't begin to pay the acquisition cost, or even a fraction of it. You have to buy so that you can come out on it in scrap, that is all.

Q. Did you ever purchase goods for less than the scrap recovery? A. I sure have.

Q. Do you know what the practice of the War Assets Administration is in disposing of residues remaining after offerings for bid?

A. Yes, I have been offered residues several times. In fact, I have purchased some. When a bid is rejected—the procedure now is to contact three dealers in that who normally buy that type of equipment, including the higher bidder.

Q. Was that the procedure at that time?

A. No, I don't believe so, although it could have been; however, I was offered surplus material at that time just on a fixed-price basis. For instance, one group of dollies, truck dollies, which I had bid on and was high bidder. My bid was rejected because it wasn't high enough. Then I offered another

(Testimony of John K. Paulson.)

price for the dollies and the salesman took it up with someone else in authority—I don't know who—but they didn't consider—— [127]

The Court: Don't go into specific instances, Mr. Tongue.

Mr. Tongue: I am very nearly through, your Honor, and this is the last witness.

Q. Mr. Paulson, was it the practice of War Assets Administration to hold goods for the last possible dollar? A. No.

Q. What was their policy?

A. The policy, as far as I was able to see, was to sell the surplus property. They had so much of it that they couldn't realize the last possible dollar, they had too much to move, although they did try to get as much as they could in a short length of time.

Q. Did you ever hear of an attempt to cancel any sale or withdraw goods after the sale had been completed and sales documents issued?

A. No, sir.

The Court: That is not in this case.

Cross-Examination

By Mr. Harr:

Q. You have been rejected on a great many bids that you have put in, have you not?

A. No, I think that in all three bids were rejected.

Q. And you say that you got goods at a fraction of the cost. How do you know what it cost?

A. Because the salesman in the various regional

(Testimony of John K. Paulson.)

offices will [128] show me the form and tell me what the acquisition cost was. On various offerings the acquisition cost will be stamped right on it.

Q. Now, this matter of negotiating sales, that is only in the last six months?

A. That is possible. That is what I said in my answer to counsel's question.

Q. Now, as to whether or not they would get a fraction of the cost, if you went down there and they had Caterpillar tractors, would you get them at cost today?

A. At cost—At less than cost.

Q. Today? A. Yes, that is right.

Q. They bring three or four times their cost price, don't they? A. That is right.

Q. So they wouldn't get it at cost?

A. They sold one today at Renton, Washington, a D-8 Cat listing around \$15,000—they sold it for \$3,760.

Q. Was that new?

A. No, but it was in very good condition. I would gladly have paid \$12,000 for it.

Q. You didn't bid on it?

A. I did, but I wasn't fortunate in the drawing. It was a fixed-price sale and you put in your offer to purchase and then [129] they draw a number out of the hat and the lucky winner got it.

Q. You think that the per cent of cost price in the overall picture is very low, is that the picture you are trying to portray; isn't it?

(Testimony of John K. Paulson.)

A. No, no, I wouldn't say that. We have some paint in our warehouse right today, and we paid a hundred and ten and a hundred and twenty per cent of acquisition cost.

Q. On that?

A. Yes. But we also have some material there which we only paid, paid less than one per cent of acquisition cost, and we can't sell it for anything.

Q. As a matter of fact, would you say that they have obtained over the period of their existence down there 29 per cent of all sales, 29 per cent of cost price?

A. I wouldn't have the slightest idea. I only know about the purchases which I have made.

Mr. Harr: I think that is all.

Mr. Tongue: No questions. You came in response to subpoena, did you not, Mr. Paulson?

A. Yes.

(Witness excused.)

Mr. Harr: We will recall Mr. Mudge.

Mr. Tongue: I have no further witnesses. I want to call attention to this deposition of Mr. Gibson who is not available. [130] It goes in evidence, as I understand.

Mr. Harr: No, I would object to it going into evidence. That is a deposition, your Honor, taken in another case in another court, and I would object to it. I don't know what counsel has in mind.

Mr. Tongue: You haven't reserved any objection to it, I don't think, Mr. Harr.

Mr. Harr: Well, I am going to object to it.

Mr. Tongue: Here is a situation of a witness not available, now in Baltimore, Maryland. We could have taken his deposition in this case back there or anywhere else. We happened to take it in connection with a proceeding in the State Court, and those proceedings were substantially, although not totally, between the same interests. Mr. Mudge was involved, and Mr. Gibson was the custodian of the goods, and we submit there is sufficient identity of interests to make these depositions admissible in this case.

Mr. Harr: Your Honor, I would object to it for another reason. Normally when you take an adverse party deposition we wouldn't cross-examine our own witness in that case, and there is no cross-examination here, and certainly we would want to meet the things that were brought out, so I would want to interpose another objection.

Mr. Tongue: You had the opportunity to examine him at that time, and your interests in cross-examination at that time were [131] identical in cross-examining him at this time if produced as a witness, and the cases, as I recall them, as to whether depositions or testimony in other cases is admissible in the instant case turn on the question whether the interest in cross-examination would be substantially the same in the other case as in the present case.

The Court: You can fight that out later. I will probably want to hear argument later. [132]

C. T. MUDGE

Regional Director of War Assets Administration, was thereupon produced as a rebuttal witness in behalf of plaintiff and, having been previously duly sworn, was examined and testified as follows:

Direct Examination on Rebuttal

By Mr. Harr:

Q. Mr. Mudge, you have heard the testimony of the preceding witness about the percentage of recovery of property sold under War Assets. What is your explanation of that?

A. Well, I have some figures that might be interesting. Cash recovery up to this time amounts to 29.9 per cent of the acquisition cost.

Q. That is the operation of War Assets by your department, or is that the over-all picture?

A. Of this Regional Office here.

Q. Of this Regional Office?

A. Yes, and the highest month was 69.9, and the lowest month was 11.8, and we averaged 29.9.

Mr. Harr: I think that is all.

Cross-Examination on Rebuttal

By Mr. Tongue:

Q. Mr. Mudge, that purports to be simply an average, does it not?

A. Yes, that is the monthly average.

Q. You don't intend to have the impression conveyed that there [133] aren't many sales both far in excess of that average, and also many sales far below that average?

A. Correct, correct.

Q. And you don't intend to convey the impression that even though a sale is far below that average it would be an invalid sale?

(Testimony of C. T. Mudge.)

A. Not necessarily.

Mr. Tongue: That is all.

Mr. Harr: That is all. The Government rests, your Honor.

(Witness excused.)

Mr. Tongue: Do you desire to hear argument or have this case submitted on written memoranda, your Honor? Either method would be agreeable as far as we are concerned.

The Court: What do you want to do, Mr. Harr?

Mr. Harr: It is immaterial with us, your Honor.

The Court: Mr. Tongue, you are for the defense, aren't you?

Mr. Tongue: Yes.

The Court: Do you want to file a memorandum?

Mr. Tongue: I would suggest that it be submitted on memoranda, your Honor. There are principally law points involved here. The Government has suggested some of the, and I suggest they be given an opportunity to file a memorandum.

The Court: He says he doesn't want to file one, so you file opening paper and he will answer you. [134]

Mr. Tongue: Can we then rebut his answer?

The Court: Yes, you can.

Mr. Tongue: Very well. How many days would your Honor——

The Court: Oh, take your time.

Mr. Tongue: Two weeks?

The Court: Do you want longer than that, three weeks?

Mr. Tongue: Three weeks, if you please.

Mr. Harr: That is satisfactory, your Honor.

The Court: Two for you.

Mr. Harr: My associate will prepare that, and he will be out of town for about two weeks.

Mr. Tongue: Your Honor, before the record closes we would like to read into the record our objections to——

The Court: You may do that by brief.

Mr. Tongue: Very well.

The Court: Now, I want to suggest one or two things. Is the bill of sale, or whatever he got, is that here among the exhibits?

Mr. Tongue: Yes, it is, your Honor.

The Court: Now, where are the gears or whatever they are?

Mr. Tongue: They are in that box.

The Court: All of them?

Mr. Tongue: One of each type.

The Court: Where are the rest of them?

Mr. Tongue: I don't know. Ask the Government. [135]

The Court: No, I didn't want to do that.

Mr. Harr: The War Assets Administration have them in their custody.

The Court: You are in equity, Mr. Harr, and suppose the case goes against you, suppose you are denied relief. How is the other man going to get what he is entitled to?

Mr. Tongue: May I say this for the information of the Court. After the gears were moved to Washington we secured a restraining order on stipulation with counsel for the Federal——

The Court: State of Washington or City of Washington?

Mr. Tongue: State of Washington.

The Court: Where in the State of Washington?

Mr. Tongue: Vancouver. That is the last information I have concerning the location of the goods.

The Court: Finish your statement.

Mr. Tongue: As I say, we secured by stipulation a temporary restraining order issued out of the District Court for the Western District of Washington in Tacoma, restraining further movement of those gears, so we presume they are still there, but we don't know.

The Court: Here is an equity case brought by Mr. Harr where he wants rescission of this paper which you have. If you had the gears, had delivery of the gears, he would want the gears within the jurisdiction of the Court and he would want a decree directing you to return them. You never got them, so he wants— [136] although he hasn't specifically pleaded—he wants this document delivered up. Now, then, suppose the case goes against him.

Mr. Tongue: We would have title to the gears and we would suppose we would be able to obtain their possession since they are now under restraining order of the Court in Tacoma.

The Court: Well——

Mr. Tongue: On that same point——

The Court: Let me finish, now. There was talk here that the gears had been withdrawn from disposal, that the Maritime Commission had withdrawn them as disposable assets.

Mr. Tongue: Your Honor, among the exhibits in this case although we didn't make specific reference to it, is a shipping notice to the Maritime Commission directing it to turn over these goods to the War Assets Administration, and I think that is evidence that the War Assets still have the assets in their control. Mr. Mudge testified also he didn't think the Maritime Commission had actually withdrawn the goods, so I think the record shows the goods are still under the control of the War Assets Administration.

The Court: What relief do you pray for?

Mr. Tongue: Well, we have, we ask that the sale be held valid and binding and plaintiff be declared owner of all the items involved in that sale and the complaints be dismissed.

The Court: You should ask for more than that, an order asking that they be turned over. [137]

Mr. Tongue: We had that in mind. There is some question—We relied on the good faith of the Government giving us the joints if we are declared the owner.

The Court: You are very trusting.

Mr. Tongue: Perhaps very much so. Yes, I would like to amend our prayer, if the Court will allow, asking for an order directing the Government to turn over these joints if it be held that this is a valid sale.

The Court: That means they would have to be brought within the jurisdiction of the Court so the order will be effective.

Mr. Tongue: Well, that is the problem, as you can see.

The Court: It wouldn't be any problem. I would just require that be done in addition before I rule in the case. The Government is here invoking equity. I don't have to exercise equity powers unless it is stated to my satisfaction, and that is a thing to be thought about.

Mr. Tongue: Well, that is in accord with our position as stated in the State Court, that under the law of Oregon the plaintiff in a replevin action doesn't have to rely on the choice of the defendant whether to give the goods or the value, but he is entitled to the goods themselves and only has to take the value if for some reason it is impossible to return the goods or if they have been destroyed.

The Court: Well, what I am talking about, my point is that I don't want to be a party to a sham battle. If this goes [138] against the plaintiff, I want to know that the relief would be equally effective against the plaintiff as it would be against the defendant.

Mr. Tongue: May we ask for a temporary order directing the Government——

The Court: No, not now. I guess that is all I have in mind. Anything else you gentlemen have?

Mr. Tongue: I think that is all.

The Court: You are going to take three weeks each?

Mr. Tongue: Yes.

The Court: Certainly as far as within your power, Mr. Harr, they won't be moved any further?

Mr. Harr: We have stipulated, your Honor, that there would be no removal.

The Court: You know they are in Vancouver?

Mr. Harr: I know from what I have been told. I am satisfied they are there.

The Court: You have been told that and which you have reason to believe.

Mr. Harr: That is right.

(Whereupon the following proceedings were had in the absence of the Court:)

Mr. Harr: In addition to the objections which are already noted in the record, plaintiff further objects to the admission [139] in evidence of Defendant's Pre-Trial Exhibits 8, 10, 12, 16, 17, 19 and 20 upon the grounds——

Mr. Tongue: 19 and 20 were withdrawn, and 16——

Mr. Harr: 19 and 20 are out?—upon the ground and for the reason that they are **irrelevant, incompetent** and immaterial and serve no useful purpose in this case to prove or disprove any of the issues involved herein.

Mr. Tongue: For the record defendant notes his objections to Plaintiff's Exhibit 2 upon the ground that the same is irrelevant and immaterial and incompetent, and upon the further ground that that exhibit is not the best evidence and that it represents a carbon copy upon which it was admitted that alterations and additions had been made after receipt by the War Assets Administration.

Defendant desires to note the same objection to Plaintiff's Exhibits 3 and 4.

Defendant desires to note objections to Plaintiff's Exhibit No. 5 on the ground that the same is irrelevant, immaterial and incompetent, and the further ground that the same is not the best evidence and that it——

Mr. Harr: Which exhibit?

Mr. Tongue: 5. ——in that it is a mimeographed copy and there is no identification or authentication of said exhibit.

Defendant further desires to note for the record his motion to strike from the record all evidence offered by the [140] plaintiff tending to show lack of authority by the representatives of the War Assets Administration to make the sale involved in this case on the ground that before lack of authority can be shown it must first be shown that the purchaser was not a bona fide purchaser and that no such showing has been made by the plaintiff in this case.

Defendant finally desires to move to strike all evidence that the Government made a mistake in the sale of these goods upon the same ground, namely that such evidence is barred by the War Surplus Commodities Act in the absence of proof that the purchaser was not a bona fide purchaser.

Defendant also moves to strike all evidence by the Government relating to its contentions that the defendant was not in good faith or that the sale should be rescinded in its entirety upon the ground that these reasons were not among the reasons

originally stated by the Government for the cancellation of the sale in this case, and that the Government waived these grounds by specifying other and different grounds for canceling this sale as stated in Defendant's Exhibit 18, and as stated in the original complaint filed in this case.

I think that is all the objections, but we want a stipulation as to corrections in this pre-trial order. I don't know if that needs to be done on the ground, because we want to reserve objection to 2 and 3 and add this as Exhibit 22.

Mr. Harr: I think it might be stipulated that the pre-trial [141] order, page 11, may be amended by interlineation, inserting the word "defendant's"—on page 11 of the pre-trial order—between lines 9 and 10.

Mr. Tongue: Well, that is your 11, which is the list of the exhibits. It may be a different page. Yes, that may be stipulated. May it also be stipulated that the pre-trial order may be amended to insert as Exhibit 2 the pleadings in the instant case, and also that defendant's objections as noted in the pre-trial order may be amended to include Exhibits 2 and 3.

Mr. Harr: And I would like to say for the record——

Mr. Tongue: Is that stipulated?

Mr. Harr: Yes. I would like to state for the record that those exhibits which were objected to by defendant's counsel as not being the best evidence, being photostatic duplicate copies, that if the Court should find those exhibits as introduced

are objectionable for the reasons stated by counsel that we be afforded the privilege of obtaining the originals thereof and substitute them for the copies as presented in court.

Mr. Tongue: We have no objection. We may also reserve the right to ask the Government to produce Exhibits 21 and 22—not 21 and 22—It is 8, 21 and 22.

Mr. Harr: I will object to the reservation of any rights to produce exhibits other than——

Mr. Tongue: Those are 8 and 21, those that Mr. Mudge was——

Mr. Harr: I will object to any reservation of any right to [142] produce any other exhibits than those available at the trial, it being my contention that the case has now been submitted finally.

Mr. Tongue: And you decline to if we request it, to ask the Government to produce these documents called for in Exhibits 8 and 21, is that right?

Mr. Harr: Yes, because our case is rested, submitted.

Mr. Tongue: Well, we would like to have it understood that in resting the case we rested subject to that reservation.

(Whereupon, at 5:50 o'clock p.m., on the 22nd day of December, 1947, the trial of the above-entitled cause was concluded.) [143]

REPORTERS' CERTIFICATE

We, Ira G. Holcomb and Glenn G. Foster, Court Reporters, do hereby certify that we jointly re-

ported in shorthand proceeding had in the above-entitled matter in the above-entitled Court on Monday, the 22nd day of December, A. D. 1947, and that the numbered pages set opposite our names below were by us respectively transcribed from that portion of the testimony and proceedings reported by each of us in shorthand: Ira G. Holcomb, pages 1 to 55, inclusive; Glenn G. Foster, pages 56 to 143, inclusive, and we hereby further certify that the said pages so set out opposite our respective names constitutes a full, true and accurate transcript of that portion of the testimony and proceedings so reported in shorthand by each of us as above certified, including objections and motions of counsel, rulings of the Court, exceptions taken and other oral proceedings had in said cause.

Dated this 6th day of April, A. D. 1947.

/s/ IRA G. HOLCOMB,

/s/ GLENN G. FOSTER.

[Endorsed]: Filed April 19, 1948.

DEFENDANT'S EXHIBIT No. 14

In the District Court of the United States
for the District of Oregon

Civil No. 3916

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HERBERT A. JONES, JR.,

Defendant.

DEPOSITION OF WILLIAM J. BURGOYNE

Taken as an adverse witness on behalf of defendant.

Be It Remembered that, pursuant to the oral stipulation hereinafter set out, the deposition of William J. Burgoyne was taken on behalf of defendant before Ira G. Holcomb, a Notary Public for Oregon, residing in Portland, on the 21st day of October, A. D. 1947, beginning at 2:00 o'clock p.m., in the United States Courthouse, in the City of Portland, County of Multnomah, State of Oregon.

Appearances: Mr. Victor E. Harr, Assistant United States Attorney, appearing on behalf of the plaintiff. Mr. Thomas H. Tongue (Hicks, Davis & Tongue), of Attorneys for Defendant.

It is stipulated and agreed by and between the attorneys for the respective parties that the deposition of William J. Burgoyne may be taken on behalf of the defendant, as an adverse witness, at

Defendant's Exhibit No. 14—(Continued)
the offices of the United States Attorney, United States Courthouse, in the City of Portland, County of Multnomah, State of Oregon, on Tuesday, the 21st day of October, A. D. 1947, beginning at 2:00 o'clock p.m., before Ira G. Holcomb, a Notary Public for Oregon.

(It is further stipulated that the deposition, when transcribed, may be used on the trial of said cause as by law provided; that all questions as to the notice of the time and place of taking the same are waived; and that all objections as to the form of the questions are waived unless objected to at the time the questions are asked; and that all objections as to materiality, relevancy and competency of the testimony are reserved to the parties until the time of trial.)

WILLIAM J. BURGOYNE

was thereupon produced as an adverse witness on behalf of defendant and, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Tongue:

Q. Will you state your full name for the record?

A. William J. Burgoyne.

Q. How old are you, Mr. Burgoyne?

A. Forty-eight.

Defendant's Exhibit No. 14—(Continued)

Q. How long have you been employed by the War Assets Administration?

A. Since July 9, 1946.

Q. In what capacity?

A. They have different headings over there. I went in as Business Analyst at first, and then I was made Chief of the Automotive Division.

Q. Are you still in that capacity?

A. No, I am Chief of the Sales Planning and Analyzing Division, now.

Q. In what capacity were you employed at the time of the sale in question to Mr. Jones?

A. Acting Chief of the Automotive Division.

Q. What had been your previous experience, Mr. Burgoyne?

A. Well, I had ten years with the Ford Motor Company, the branch here in Portland.

Q. Did that involve the assembly of cars?

A. Involved the assembly of cars and sales and sales promotion work and all of that.

Q. Had you had any other automotive experience?

A. Well, I worked two years for E. C. Simmons of Eugene, Ford dealer.

Q. In what capacity were you employed there?

A. Started in as a tractor salesman and I ended up as shop superintendent.

Q. Engaged in the repair of motor cars?

A. That is right.

Q. Mr. Burgoyne, you refer to the Automotive

Defendant's Exhibit No. 14—(Continued)

Division. I notice from the exhibit attached to the Government's complaint in this case, designated as a copy of Special Offering No. C-286, that it refers to the Automotive and Machinery Sales Division. Is that the division to which you refer?

A. Yes, there was machinery involved in that. We had some construction machinery and that went with the automotive, automotive and machinery.

Q. There was just one division, Automotive and Machinery, is that right? A. That is correct.

Q. And that is the division of which you were the Acting Chief? A. I was at the time, yes.

Q. Now, referring again to this Special Offering No. C-286, were these special offerings prepared by your division?

A. Yes, by the division I was in.

Q. At that time did you have charge of the preparation of this special offering?

A. No. I had men that worked with me in that division and they made the offerings up.

Q. Were they subject to your approval?

A. Yes, my approval, and we had special forms to list all this equipment on.

Q. To whom were these special offerings sent, if you know?

A. When a special offering of the Automotive Division was sent down, primarily it would go to the Automotive and Construction Machinery mailing list, but I checked up—of course, before that, they would send these down and the Advertising

Defendant's Exhibit No. 14—(Continued)

Department would look them over and they would send them to other mailing lists, and I checked and I find that this particular one, 286, was sent to Rough Hardware and Light Hardware, and Construction Machinery, and Farm Implements, because there was pumps in that, like Mitchell, Lewis & Staver, who handle farm machinery and pumps: also sent to Metals, which would be the scrap dealers in town. They buy up the metals and steel and pipe and all that stuff. That is about all that I recall that this particular one went to. It went to several outside of Automotive, but that was arbitrarily set up by the Advertising Division, because it was a mixed program.

Q. Mr. Burgoyne, I wonder if you would be good enough to take this Special Offering No. C-286 and go through the various items and indicate which of the items consist of automotive parts and which of them consist of other types of machinery and parts. A. No. 1—

Q. I think you should designate them by numbers.

A. No. 1 would be Automotive. That is part of a truck.

Q. Yes. A. And No. 2, that would—

Q. That is "Cock, plug?"

A. "Cock, plug," yes. Well, that could be used by construction machinery people or hardware people.

Q. Is that an automotive part?

Defendant's Exhibit No. 14—(Continued)

A. From the description, I could not tell whether it is an automotive part or not, but it was brought to me and I programmed in the Automotive Division.

Q. Engine assembly?

A. Yes, that would be automotive, those two items there.

Q. That is, for each of these items listed as No. 3? A. Yes.

Q. Now, Item No. 4.

A. Journal jacks. Well, these ball-bearing jacks could be used in construction and automotive, also. That is one of these.

Q. Was it made as an automotive jack?

A. No, it was not made—they sent it to my division to be programmed.

Q. What was it made for?

A. It was used in the shipyards for jacking, as I recall. That is what I supposed it would be used for, the use it would be made—a lot of these maritime tools we did not know much about. Anyway, in fact, I did not know anything about that.

Q. Then, the next item, jack, journal, No. 5.

A. That would be the same as No. 4. That is the same type of equipment.

Q. No. 7, jacks, hydraulic?

A. Yes, that would be the same, and also No. 8. That is ratchet jacks. That could be used for construction, any type of construction work.

Defendant's Exhibit No. 14—(Continued)

Q. Where were these jacks located at the time, do you know?

A. They were located in one of these shipyards. It gives the location here of all of these jacks. Located at Columbia Metals Corporation, Salem Oregon.

Q. Where does it show the location?

A. Right down here. It starts right here, shows the location.

Q. I see. Do these locations refer to everything preceding?

A. Yes, that is right; just to Item No. 14. That is all jacks. These here were located at Columbia Metals.

Q. Now, Item No. 9, jacks, push-pull.

A. Yes, jacks, push-pull. They would be similar to these other jacks and could be used for construction work. I think they could be used for automotive, too—push-pull jacks.

Q. But a push-pull jack was probably used in connection with the shipbuilding program, wasn't it?

A. Yes, they used that equipment. It was adaptable to other lines.

Q. Item No. 10, push-pull jacks.

A. Yes, that would be the same as No. 9.

Q. And No. 11? Journal jacks?

A. Journal jacks. Well, yes, journal jacks, ball bearing. That is the same as the first few jacks. They have them mixed up.

Defendant's Exhibit No. 14—(Continued)

Q. Item No. 12, jacks, journal, low height.

A. Jacks, journal, low height, ball bearing, screw type. They would be used in construction work, even in house moving or things like that.

Q. Wouldn't they be larger than were ordinarily used in automotive?

A. Well, they would be, yes, but they could be used as construction equipment, also.

Q. Journal jack, low type, 25-ton.

A. That would be the same proposition.

Q. A 25-ton jack? A. Yes.

Q. Item 17, jacks, screw, low height. That would be the same thing, would it? A. Yes, sir.

Q. I mean to refer to Item 14, 17 jacks.

A. Yes.

Q. Item No. 15, jacks, screw?

A. The same jacks. They could be used in construction equipment.

Q. 25-ton jacks?

A. Yes, 25-ton jacks. It is not a very big jack, a 25-ton screw-type jack is not, is not a very big jack.

Q. What was it made for, do you know?

A. Well, it is made for several different things. I understood they were used in these different plants. I don't know where these came from. This says, "Pendleton Army Air Base." No, wait a minute.

Q. In connection with the Air Corps program, then?

Defendant's Exhibit No. 14—(Continued)

A. Well, I will have to go back. They changed these locations on here. Now, they put the location down at the bottom of the list, but at this time they put it at the top of the list, the location where this equipment was.

Q. You refer now to Item No. 1?

A. Yes, that is right. It is at the top. Now they put it at the bottom of the list.

Q. You mean, then, the jacks were located at Kaiser Company, Swan Island?

A. Yes, that is right, Kaiser Company, Swan Island.

Q. That is where all these jacks were?

A. I was mistaken in that, because they changed the way they did it.

Q. Items 15, 16 and 17 were at Columbia Metals? A. Columbia Metals, Salem, Oregon.

Q. Then we come to Item No. 18. A. Yes.

Q. Airplane tripod, hydraulic, jack?

A. Yes, that is right. They threw the airplane equipment in with the automotive. We did not have any airplane division for component parts of airplanes, so they threw it in with automotive and I advertised it as such.

Q. Items 19 and 20 and 22—21 and 22—are similar airplane-type jacks?

A. Yes, used at Pendleton Army Air Base for airplane work.

Q. All located at the Pendleton Army Air Base?

A. Yes.

Defendant's Exhibit No. 14—(Continued)

Q. Then we come to Item 23, kingpins for trailer hitch.

A. That would be automotive. Those were at Gunderson Brothers, Portland, Oregon.

Q. That would be automotive equipment?

A. Yes, that would be.

Q. Item No. 24, Norgren lubricator. What is that?

A. Well, I don't know what this is. At the time I figured it was one of these lubricators for pressure lubrication, and I advertised it. I put it in this automotive program. That was my idea of it.

Q. Item 25, spare parts, location Kaiser Company, Inc., Vancouver. What would that be? Would that be at the shipyard?

A. That would be Kaiser Company shipyard, yes.

Q. Go ahead.

A. Like I say, I was unfamiliar with the marine situation, the marine stuff, and I couldn't tell about all this type of material that was given to me in my division to program.

Q. You knew that that was marine material, did you not? A. Well, I couldn't say.

Q. At least, you knew it was at the Kaiser shipyard in Vancouver?

A. That is right, Kaiser shipyard.

Q. Item 26, miter gear, located at Oregon Shipbuilding. That would be the same thing, would it?

A. Well, yes. Miter gear—that was located at

Defendant's Exhibit No. 14—(Continued)
the Oregon Shipbuilding. I was unfamiliar with the type of equipment that they used.

Q. You did not think it was automotive equipment, though, did you?

A. I couldn't place it. This—What do I want to say? Might have placed it in several categories, according to this description here.

Q. In your experience, your previous experience with the Ford Motor Company and otherwise in the automobile field, did you ever encounter a miter gear?

A. No—Well, in manufacturing, yes. I was back to the Ford Motor Company in Detroit several times and I went through and I heard engineers back there talking about miter gears. Miter gears of several different types were used.

Q. Did you ever see one used on a motor car?

A. Never have. I never have seen one used any place.

Q. Items 27, 28, 29 and 30, are these universal gear joints that are in controversy? A. Yes.

Q. Those, as indicated, were at the Oregon Shipbuilding Corporation? A. Yes.

Q. And you knew they were at the Oregon Shipbuilding Corporation at that time, did you not, Mr. Burgoyne?

A. The location was at the Oregon Shipbuilding. That is on the declaration.

Q. What is this Item No. 31, chess wagon?

A. That was a piece of equipment that could

Defendant's Exhibit No. 14—(Continued)

be used by farmers, or at least I figured it could. I approximately know what it was. It is a wagon, I was told, that had steel tires on and was a pull-type wagon.

Q. It is not automotive equipment?

A. No, it is not automotive equipment, but it did come under "farm machinery" and "construction material" in that division.

Q. No. 32, chess wagon, that would be the same thing? A. Yes. You skipped over these.

Q. I will go into these gears in more detail later, these gear joints. Are you familiar with what an automotive universal gear joint is?

A. Yes, quite familiar.

Q. Can you describe one?

A. Well, it is a joint that could be used for a car connection, between the engine and the rear wheels, a flexible joint.

Q. How is the joint constructed? Is it a hinge joint or is it a gear joint?

A. No, it is not a gear joint. Most joints are constructed (illustrating)——

Q. You will have to explain yourself so that the Reporter can get it. He cannot see what you describe with your hands, unfortunately.

A. I wouldn't know just how to put it. There are two pieces of metal connected so that they will linge or work in different angles.

Q. Is there any gear involved in an automotive universal joint?

Defendant's Exhibit No. 14—(Continued)

A. An automotive universal joint? Well, no, there would not be any gear.

Q. How much of an angle do they operate from?

A. Well, I have an idea that they would angle at maybe 15 to 18-degree angle, something like that.

Q. How is the connection made to and from an automotive universal joint?

A. Just what do you mean by that?

Q. Is there a socket that the shaft fits into?

A. It has a socket on most of them, a female and male socket, you see.

Q. So that an automotive universal joint has a socket into which the shaft fits, is that correct?

A. Most of them are, yes. Some of them are riveted. Some of them are solid, in some cars.

Q. How much would a marine automotive joint weigh? A. A marine automotive joint?

Q. No, an automotive universal joint, pardon me.

A. Well, it all depends on the size of the vehicle, I guess. I would say on these heavy trucks they would weigh several pounds and on a passenger car it would be maybe three or four pounds or two and a half pounds, because there are so many different types. They are made for these heavy trucks and passenger cars, you see.

Q. Now, looking again at Special Offering No. C-286, I call your attention to the description of this universal joint, these universal joints, as set

Defendant's Exhibit No. 14—(Continued)
forth in Item 27, Item 28, Item 29 and Item 30.

A. Yes.

Q. And I call your attention, first, to the fact that these joints, according to the description, will operate from zero to 92 degrees. A. Yes.

Q. Did you ever see an automotive universal joint that would operate up to 92 degrees?

A. Well—

Q. Or, shall I say, did you ever see a universal joint on an automobile operate up to 92 degrees?

A. It is very improbable that it would, because that is practically at a right angle.

Q. Yes. I call your attention to the fact that these descriptions for all of these four items refer to gear joints. A. Yes.

Q. Are automotive universal joints gear joints?

A. Well, they may be. Some universal joints might be called gear joints, I couldn't say.

Q. What I am asking is this: Does the usual automotive universal joint operate on a gear?

A. No, they would not operate on a gear. They would connect your gear case with your rear axle assembly.

Q. I call your attention to the fact that in the descriptions of all these four items they would indicate that there are shaft connections.

A. Yes.

Q. Of various lengths. A. Yes.

Q. From three inches to eighteen inches long.

Defendant's Exhibit No. 14—(Continued)

Does the usual automotive universal joint have any shaft connection of that type?

A. Some universal joints have. One end comes on the shaft—I have known of cases like that. But here is another thing I want to say right here: We got such a terrific volume of this stuff in that lots of times we would not go in deep enough into this stuff to catch all of these items.

Q. Yes. If you had read that specification carefully, Mr. Burgoyne, at that time, would you have supposed that was an automotive universal joint?

A. If I would have read it carefully, I might have come to the conclusion that it might not have been.

Q. At least, you knew that it was located at the Oregon Shipbuilding Corporation, did you not?

A. Yes, it was located there.

Q. And it was put there for use in connection with their shipbuilding program. You knew that, didn't you?

A. However——

Q. Just answer that question first.

(Question read.)

A. No, I didn't know that, because we have received parts since then and previous to this, automotive parts of all kinds that they had for their general repair of automotive equipment.

Q. How many of these gear joints were there?

A. I don't recollect that.

Q. Weren't there some several thousand of them?

Defendant's Exhibit No. 14—(Continued)

A. There was quite a number of them, yes.

Q. Were there not over four thousand of these universal joints?

A. I can't recall right now how many. I think there were—oh, there was quite a few of them.

Q. I call your attention to Form WAA-1-A, as filled out in connection with this sale to Herbert A. Jones, dated November 6, 1946. A. Yes.

Q. It indicates there were 199 of the first type of joint, 2,942 of the second type of joint, 1,655 of the third type of joint and 28 of the fourth type of universal joint. You were familiar with those facts?

A. I might have been at the time. I couldn't say definitely because it has been quite a while ago, but I knew that there was quite a few there.

Q. Did you ever hear of them having that many spare parts for their trucks at the Kaiser Shipyards and the Oregon Shipyards?

A. Well, that would not seem practical to have that many universal joints. However, like I say, I was not familiar with the equipment at the time.

Q. At least, Mr. Burgoyne, would you say or would you not say that these joints were completely described in this special offering so that anyone familiar with them would have known their nature and the use to which they could be put?

A. They might have been described that way to a man that would understand from a shipbuilding

Defendant's Exhibit No. 14—(Continued)

standpoint, that they were parts to go in a ship, but at the time I didn't know that.

Q. What did you think they were?

A. From the description there as universal joints, I thought they were automotive, because they were sent to me to be programmed in the automotive Division.

Q. You knew there were a lot of items that were not automotive equipment?

A. Some of the items like jacks which would go in construction machinery and all that—

Q. Do you recall Mr. Jones coming out to talk to you about this sale?

A. He came out, and I don't recall—he didn't talk to me. He talked to Mr. Webb.

Q. Didn't he talk to you?

A. After talking to Mr. Webb, Mr. Webb brought the list over to me and told me that Jones wanted to buy it.

Q. What did you say to Jones, and what did he say to you?

A. Well, I don't remember what Jones said to me, and I can't remember a thing I said to Mr. Jones.

Q. To refresh your recollection, at that time and place—I assume that it was on or about the 30th of October, 1946, at the office of the War Assets Administration in Portland—did you discuss with him these universal joints?

Defendant's Exhibit No. 14—(Continued)

A. I don't remember discussing with Mr. Jones anything about the universal joints.

Q. Did you or did you not tell him that these joints were left over at the shipyards and were located at the shipyard?

A. I couldn't say. I don't remember. The truth is I don't remember, because I don't remember my conversation with Mr. Jones, after talking to Mr. Webb.

Q. Would you deny you ever made that statement?

A. I couldn't deny it and I couldn't affirm it.

Q. Do you recall whether or not you talked with him about what he should be able to do with these joints and where he should be able to sell them, whether or not you suggested that he might be able to sell them to shipyards in the East that were still operating? Does that refresh your recollection at all?

A. No, it don't. I think I mentioned to Mr. Jones that if he bought the universal joints he could dispose of them, but I can't recall if I made any specific statement as to who he could sell them to.

Q. Do you recall whether you made any suggestions as to where he might seek a sale of these joints? A. No, I don't. I don't recall that.

Q. Do you deny you ever made any such suggestion?

A. I would not deny it, but I would not confirm it, because I cannot give the exact conversation that went on down there. It was very short, because he

Defendant's Exhibit No. 14—(Continued)
was talking to Mr. Webb at the time, or before that.

Q. Did you show him the specifications for these various items as set forth in the special offering?

A. I don't recall it. Mr. Webb might have, but they were on the offering. I suppose he had the offering, I don't know. I don't recall showing Jones the specifications or discussing them with him.

Q. What, if anything, did you tell him about these universal joints?

A. Truthfully, I can't recall the conversation.

Q. Will this refresh your recollection at all? Did Mr. Jones, or did he not, tell you he had had experience with these joints while employed at the Commercial Iron Works or otherwise, that he had seen them and knew what they were?

A. No, I don't recall that conversation with Mr. Jones.

Mr. Harr: What place did you say?

Mr. Tongue: The Commercial Iron Works.

Q. You say you thought, although you did not read the description, that those were automotive parts. Is that what we are to understand from your testimony? A. Pardon?

Mr. Tongue: Read the question.

(Question read.)

A. At the time when I programmed them, I thought they were automotive parts.

Q. The special offering was submitted to you for approval, was it not? A. Yes.

Q. If they had been automotive parts, what

Defendant's Exhibit No. 14—(Continued)
would they have been worth as scrap? How much would they have weighed?

A. I had nothing to do with any scrap disposal. I didn't know what the value of that was for scrap.

Q. As far as their scrap value was concerned, would there have been any difference whether they were automotive parts or marine equipment, if they were of the size and nature described in this special offering?

A. It all depends on the construction of them and the metals in them. The scrap value would depend on the construction of them, that is, the kind of metals that were in them.

Q. In the Government's complaint, it is alleged that these joints had a scrap value of \$2,260. Had they been automotive joints, would they have a scrap value of approximately the same amount?

A. Well, I couldn't say if they would or not, because I had nothing to do with the appraising of scrap or selling of scrap, as scrap. That was taken care of by a different department over there.

Q. Well, would it be a substantial value? Would they have had a substantial value? Was it in excess of a thousand dollars, if they had been automotive joints?

A. Well, I would say they would have been worth quite a bit of money, yes.

Q. Far more than a thousand dollars, would you say?

A. I couldn't say how much, but they would be worth quite a bit of money.

Defendant's Exhibit No. 14—(Continued)

Q. Even if they were automotive joints, as you supposed, is that correct?

A. Yes, that is right, on a scrap basis.

Q. On that same basis, would you have been authorized to sell them for \$75, along with all of these other things?

A. I had no idea of any scrap value at that time.

Q. Did you receive authorization to sell this lot for \$75?

A. The only authorization that was made, it was signed by Mr. Zannon.

Q. How do you spell that name?

A. Z-a-n-n-o-n. We called it the WAA-2.

Q. That is WAA-2?

A. Yes, that is the memorandum billing.

Q. Was that the billing under which these were sold for \$75? A. Yes.

Q. In other words, he confirmed your sale, is that right? A. Yes, he signed the WAA-2.

Q. What is his capacity?

A. Mr. Zannon is assistant to the Deputy Regional Director of Disposal.

Q. Now, Mr. Burgoyne, it is set forth in the Government's complaint—and correct me, counsel, if I misstate this—that the reason why no bids were received was that men with automotive knowledge knew that these were not automotive parts or equipment. Would you say that is a fair, true statement?

Mr. Harr: I want to object to that as calling for a conclusion. A. Pardon?

Defendant's Exhibit No. 14—(Continued)

Mr. Tongue: I will ask for the answer. You can save your objection.

Mr. Harr: Yes.

(Question read.)

Mr. Tongue: Q. Let me read you the entire paragraph that I am referring to. It is Paragraph 6 of the Government's complaint, which reads as follows:

"That the said Universal Gears were, as aforesaid, together with other equipment and parts, thus advertised and circulated, as aforesaid, as Special Offering C-286, which is said Exhibit A, attached hereto, and in which said special offering the aforesaid gears were fully and completely described; that because the same were not automotive parts or equipment, readily known by men with automotive knowledge and experience by reading the technical description thereof in the said special offering, no bids were received from veterans or from men engaged in the automotive business and trade."

I ask you whether, to your knowledge and based on your experience, that is a true statement?

A. That might have been the reason we didn't get any bids on this equipment.

Q. But you say that these offerings were sent to a great many other people than people engaged in the automotive trade?

A. Yes, they were sent to other listings.

Q. Do you know why no bids were received?

A. Well, we didn't get any bids on them, to my knowledge.

Defendant's Exhibit No. 14—(Continued)

Q. Among those to whom the listings were sent were junk or scrap dealers, were they not?

A. Yes, metals.

Q. And you received no bids from them, did you?

A. Not that I know of.

Q. Was there anything else that might have been done to receive bids on these goods?

(Question read.)

A. Well, there is nothing that we could have done to offer them in any other way so that we would receive them, except just taking a chance by reprogramming them like we did. We reprogrammed them and tried to get bids again.

Q. What I am asking you is this? Here you have these gear joints placed in a special offering with other items, some of which are automotive equipment and some of which are not automotive equipment; you send that offering, that special offering, not only to the automotive trade but to scrap dealers and to others. Even if you supposed or knew that these were not automotive equipment, would that have changed your program? Would that have changed your program in trying to sell these goods?

A. No, it would not have changed my program. When these came to my attention to program them, consequently they were offered to that type of business.

Q. And that included the scrap dealers, did it not?

A. The Advertising Department arbitrarily put

Defendant's Exhibit No. 14—(Continued)

it on these other listings that I gave you a while back here.

Q. These descriptions show, do they not, that these joints are made of bronze? A. Yes.

Q. Did I understand you to say "Yes"?

A. Yes, that is right.

Q. So they would have a substantial scrap value, would they not? A. They should have.

Q. That should be apparent from the descriptions on their face, should it not?

A. Yes, by advertising and stating that there were bronze parts in them would indicate the scrap value was fairly high, I think.

Q. A scrap dealer, reading that description, should have full information regarding the scrap value of those items?

A. If he would have checked it up, yes.

Q. In your years of experience in the automotive industry, did you ever see a universal joint, such as one of those described in these four items, used on an automobile?

A. Let me put it this way: When I advertised those—

Q. Just answer the question, first.

A. —I did not realize—

Q. That is not answering the question. I am just asking you if you ever saw a joint such as these joints used on an automobile in all your years of experience in the automobile industry?

Mr. Harr: Answer it Yes or No and then explain your answer, if you want to, Mr. Burgoyne.

Defendant's Exhibit No. 14—(Continued)

A. Well, I will No, but, to qualify that, I did not know what these joints were when I advertised them. I did not realize what they were. I figured they were universal joints or automotive equipment.

Mr. Tongue: Q. If you had read the description, would you then have supposed that they were automotive equipment, considering your experience in the automotive industry?

A. I would not have been certain about it.

Q. Would there have been at least some reason for doubt in your mind that they were automotive equipment, if you had read the description?

A. There may have been reason for doubt in my mind, due to the fact that they had some bronze in them, but I have been out of the automobile business—

Q. Do I understand you to say—

Mr. Harr: Pardon me. Let him finish his answer.

Mr. Tongue: Finish your answer. Do you have anything else in direct response to that question?

A. No, that is all.

Q. Do I understand you to say, Mr. Burgoyne, if you had read these descriptions, knowing that they were bronze, and that they had an angle up to 92 degrees, that they had a shaft, and that they were of a gear type, you might have thought that they were automotive universal joints?

A. There would be some question in my mind, yes.

Defendant's Exhibit No. 14—(Continued)

Q. How could you have supposed that they were automotive joints?

A. I have been out of the automobile business since 1933, about thirteen years, and the construction of automotive parts has changed and, naturally, I don't keep up with them, because I have never worked around automotive since I left the Ford Motor Company in 1933.

Q. Whom were you employed by immediately prior to your employment by the War Assets Administration? I think you told me you worked ten years for the Ford Motor Company?

A. Yes, from 1923 to 1933.

Q. What did you do, then, in 1933?

A. I was in business for myself up until the war, 1942, and then I went in the Navy for about two and a half years.

Q. What business were you engaged in during that time?

A. I was in the restaurant business.

Mr. Harr: 1933 to 1942?

A. Yes, 1933 to 1942.

Mr. Tongue: Q. Mr. Burgoyne, you say, since you were out of touch with the automotive industry, you may have assumed that they were automotive equipment, even if you had read the full description and knew that they were at the Oregon Shipyards? Now, let me ask you this question: Had you not read that description, and having known that they were at the Oregon Shipyards, would you not have been equally likely to have sup-

Defendant's Exhibit No. 14—(Continued)

posed that those joints were marine equipment or non-automotive equipment?

A. I might have.

Q. Had you read the description? A. Yes.

Mr. Tongue: I think that is all.

Mr. Harr: That is all.

And further deponent saith not.

Notary's Certif.

In the District Court of the United States
for the District of Oregon

Civil No. 3916

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HERBERT A. JONES, JR.,

Defendant.

State of Oregon,

County of Multnomah—ss.

I, the undersigned, Ira G. Holcomb, a Notary Public for Oregon, do hereby certify that on the 21st day of October, A.D. 1947, before me as such Notary, in the office of the United States Attorney, in the City of Portland, County of Multnomah, State of Oregon, personally appeared, at the time and place mentioned in the caption and stipulation set out on pages numbered 1 and 2 of the foregoing

Defendant's Exhibit No. 14—(Continued)
transcript, William J. Burgoyne, produced as an adverse witness on behalf of the defendant.

Mr. Victor E. Harr, Assistant United States Attorney, appearing in behalf of plaintiff, and Mr. Thomas H. Tongue (Hicks, Davis & Tongue), of attorneys for defendant, appearing in his behalf; and the said witness being by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and being carefully examined, in answer to oral interrogatories propounded, testified as in the foregoing annexed deposition, pages numbered 1 to 29, both inclusive, set forth.

I further certify that all interrogatories propounded to said witness, together with the answers of said witness thereto and all objections and motions taken or made, and other proceedings occurring upon the taking of said deposition, were then and there taken down by me in shorthand and thereafter reduced to typewriting under my direction; that that the deposition, when fully transcribed, was submitted to the witness for examination and reading to or by him and opportunity to the witness to make any changes in form or substance, and that the same was then signed by the said witness in my presence; and that said deposition has been retained by me for the purpose of sealing up and directing it to the Clerk of the above-entitled Court, as required by law.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties, or a relative or employee of such attorney or coun-

Defendant's Exhibit No. 14—(Continued)

sel, or financially interested in the action.

In witness whereof, I have hereunto set my hand and notarial seal this.....day of October, A.D. 1947.

.....

Notary Public for Oregon.

My Commission Expires: July 21, 1948.

—

DEFENDANT'S EXHIBIT No. 15

In the District Court of the United States
for the District of Oregon

No. Civ. 3916

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HERBERT A. JONES, JR.,

Defendant.

DEPOSITIONS OF DELBERT F. WEBB and
LOUIS A. ZANON,

Employees of Plaintiff,
Taken in behalf of Defendant.

December 12, 1947

Be it remembered that, pursuant to oral stipulation hereinafter set out, the depositions of Delbert F. Webb and Louis A. Zanon, employees of plaintiff, were taken on behalf of the defendants before Glenn G. Foster, a Notary Public for Oregon, on

Defendant's Exhibit No. 15—(Continued)
Friday, the 12th day of December, A.D. 1947, beginning at 2:30 o'clock P.M., at Room 510, United States Court House, in the City of Portland, County of Multnomah, State of Oregon.

Appearances: Mr. Gene B. Conklin, Assistant United States Attorney, in behalf of plaintiff; Mr. Thomas H. Tongue, attorney for defendant.

STIPULATION

(It is stipulated and agreed by and between the attorneys for the respective parties that the deposition of Delbert F. Webb and Louis A. Zanon, employees of plaintiff, may be taken on behalf of the defendant at Room 510, United States Court House, in the City of Portland, County of Multnomah, State of Oregon, on Friday, the 12th day of December, A.D. 1947, beginning at 2:30 o'clock p.m., before Glenn G. Foster, a Notary Public for Oregon, and in shorthand by the said Glenn G. Foster.

(It is further stipulated that the depositions, when written up, may be used on the trial of the cause as by law and Rules of Civil Procedure for the District Courts of the United States provided; that all questions as to notice of the time and place of taking the same are waived; and that all objections as to the form of the questions are waived unless objected to at the time the questions are asked, and that all objections as to materiality, relevancy and competency of the testimony are reserved to the parties until the time of trial.

(It is further stipulated that the reading over of

Defendant's Exhibit No. 15—(Continued)
the testimony to or by the witnesses and the signing thereof are hereby expressly waived.)

DELBERT F. WEBB,
employee of plaintiff, was thereupon produced as a witness in behalf of defendant and, being first duly sworn, was examined and testified as follows:

Examination by Mr. Tongue:

Q. Will you please state your full name, Mr. Webb? A. Delbert F. Webb.

Q. And where are you employed?

A. I am employed at the War Assets Administration.

Q. What is your position there?

A. At the time it is Assistant Sales Manager.

Q. What was your position there on October 30th? A. Clerk-typist.

Q. In what division?

A. Automotive division?

Q. When you say "automotive division" I take it that you mean the automotive and machinery sales division, is that correct?

A. That is correct.

Q. So, do I understand correctly that that division sold other equipment than automotive equipment on occasions, is that right?

A. Automotive equipment consists of mobile vehicles and parts.

Mr. Tongue: Would you read the question, please?

(Last question read.)

A. No.

Defendant's Exhibit No. 15—(Continued)

Mr. Conklin: You mean where he worked, don't you, Mr. Tongue?

Mr. Tongue: No, I mean the entire division.

Q. Did this division sell only automotive equipment, or did it sell equipment other than automotive equipment?

A. The breakdown in the division, the division which consists of the automotive and parts division, the construction equipment, and the strictly auto parts service.

Q. I see.

A. And I was in the automotive equipment and parts department of that division.

Q. I see. Now, did you ever see the document entitled "Special Offering No. C-286"?

A. Yes, sir.

Q. You have a recollection of the various transactions under which the goods listed in that special offering were sold?

A. Yes. Under a sealed bid.

Q. Was there a residue remaining after sealed bids had been submitted on certain items in this special offering?

A. After they had been submitted and opened there was residue, yes, sir.

Q. Was that residue offered for sale at a fixed price as one lot?

A. After the time of the opening?

Q. I say, the residue that remained after the bids were opened.

A. No, not at a fixed price.

Defendant's Exhibit No. 15—(Continued)

Q. Well, what did happen, if you know; what were the various steps to your knowledge in the disposal of the residue remaining after sealed bids were offered, were submitted?

A. After it became residue the equipment was either offered again on sealed bid—that is the procedure of it—either offered again on sealed bid or negotiations were made. In this case, since Mr. "Cece" Williams, who opened the bids under the branch, awards branch, would deem it as residue, it was his opinion that it should be offered on negotiations as to what the best amount of money they should receive for that residue as a lot.

Q. Do you remember about when that took place?

A. The time of his statement, or bid opening?

Q. Yes. A. No, I can't remember that.

Q. Well, about what month, or do you have any recollection about when that was prior to October 30th, 1946?

A. I believe it was in September. I can't remember.

Q. And then this residue was placed for sale as a lot? A. Yes.

Q. Was any price fixed, placed on that residue?

A. No.

Q. Did various persons come and inquire concerning the possibility of purchasing that residue?

A. One.

Q. In addition to Mr. Jones?

A. No, just Mr. Jones.

Defendant's Exhibit No. 15—(Continued)

Q. There were no other persons that made any inquiries? A. Not to me, no.

Q. Well, do you have any knowledge of whether or not there were any other persons who made inquiries? A. No.

Q. Now, who authorized the sale on that basis?

A. The sale was made by Mr. Burgoyne.

Q. Well, I mean who was it decided that this residue should be offered as a lot at the best price that could be negotiated?

A. In the opinion of Mr. Williams, after the bid opening.

Q. Who was Mr. Williams?

A. He was at that time in charge of the awards branch, I believe.

Q. Was it necessary or did anyone else confirm his decision in that respect?

A. It was acknowledged by Mr. Burgoyne.

Q. Now, a question as to your internal procedure there. Can the awards branch decide what goods are to be sold as a lot at a fixed price, or is that something that your division has to decide for itself?

A. The original offering is decided by Mr. Burgoyne, who is chief of the section—at that time. He decides whether it should be offered as a lot or the original declaration of quantity, that is the original offering.

Q. Was that customary there?

A. To decide whether or not—

Q. For him to make that decision?

Defendant's Exhibit No. 15—(Continued)

A. Whether it is to be offered as a lot or in quantity?

Q. Yes. A. Yes.

Q. Had that been done before?

A. Well, to begin with, the property is declared either by each or by job lot, and if it is declared as a job lot he offers it as a job lot, he doesn't break it down. If it is each, it is my opinion at the time he had the prerogative of either offering it as a job lot or original declaration.

Q. Had he done that on previous occasions?

A. That I can't remember, because I just came to work there.

Q. Did you have any reason to doubt his authority to make that authorization?

A. No; since he was chief, no.

Q. Now, you say that that was done some time early in September, as you recall?

A. The original issue that was made?

Q. No, that a determination of this residue, that it should be placed on sale as a lot for a negotiated price.

A. Yes, I believe it was in September. I can't remember exactly. If I could see the date on that (indicating) I could tell you.

Q. Did you receive any instructions at that time as to the minimum price that would be acceptable for the sale of that lot?

A. Mr. Burgoyne said no lower than \$75.

Q. Did he make any previous statements to you

Defendant's Exhibit No. 15—(Continued)
as to the minimum price that would be accepted,
any higher figure than that?

A. A higher figure than that?

Q. Yes. A. Say that again.

Q. Well, what I am trying to get at is this, Mr. Webb: It is our understanding that this lot was first put up for sale with instructions to sell it at not less than nine hundred or a thousand dollars, and that was lowered to \$250, and then later lowered to \$75. Was that substantially what happened, or was it different than that?

A. The only set price that I remember is \$75.

Q. You have no recollection of any—

A. I didn't have nothing to do with that. That is not my authority.

Q. Let me ask you this: Were those instructions given to you prior to the time that Mr. Jones came to look at the goods and when the original goods were originally placed for disposal on that basis?

A. No.

Q. When was that instruction given to you?

A. I believe it was the intermediate time between the time I spoke to Mr. Jones and the time I spoke—Mr. Jones spoke to Mr. Burgoyne.

Q. Did Mr. Jones come out there on more than one occasion?

A. He had been there previously to buy other automotive equipment.

Q. Did he discuss or did you discuss with him this equipment at any previous time? A. No.

Q. And there was only one visit by him and

Defendant's Exhibit No. 15—(Continued)

one contact by him with you for the sale of this equipment? A. That is right.

Q. On one day, is that right?

A. I believe so.

Q. Would you be positive that he hadn't been out there on an earlier occasion?

A. On that specific equipment?

Q. Yes.

A. No, not prior to the time he contacted me.

Q. Well, you are positive that he didn't or you are not positive?

A. I am positive that he didn't contact me regarding this equipment prior to the time he came in asking for automotive engines.

Q. Prior to October 30?

A. Whichever the date was. I don't remember.

Q. The same date it was sold?

A. No, it wasn't sold—I can't remember whether it was sold on the same day or the day after, but I had one contact with Mr. Jones regarding this equipment.

Q. Well, what was said by you and what was said by him on that occasion, if you recall?

A. During that time we had a receptionist and it was the procedure of the receptionist to receive the prospective purchasers and phone one of the fellows in the division that the customer was interested in and ask for an interview, and we have Mr. Peterson and Mr. Burgoyne and they were both busy—Mr. Burgoyne was on the telephone—and the receptionist asked me if I would take care of

Defendant's Exhibit No. 15—(Continued)
a fellow interested in automotive engines, and I said "Yes," and then he came in and sat down and told me he was interested in buying some engines, and I told him there were two engines left, Jeep engines.

They were on a program which had just closed and it was residue. He said he was interested in the engines. I told him, however, if he wanted to buy the engines he might have to buy the entire residue to obtain these same engines.

Q. Did you tell him then what the price was?

A. There was no price on it.

Q. On the whole lot?

A. No. I will retract that statement. I can't remember.

Q. You can't remember whether you quoted the price or not? A. No.

Q. Pardon the interruption. Go ahead.

A. Then I told him he would have to see Mr. Burgoyne as to the purchase of that equipment because only Mr. Burgoyne had the authority to sell it and I was not a salesman, I was merely there to help them because Mr. Peterson and Mr. Burgoyne were busy.

Q. Did you then—

A. Then he said he didn't know whether he wanted to buy the complete residue as he didn't know what he was going to do with the junk—and "junk" referring to other than the engines. I believe that is all the conversation I had with him, that I can remember.

Defendant's Exhibit No. 15—(Continued)

Q. Did you show him this special offering?

A. Yes.

Q. You showed him a description of these various items as they are quoted in this special offering?

A. I pointed out the engines to him, but did not enumerate the stuff that he would have to buy, I mean the supposition that he would have to buy the other.

Q. Was he told what the other items were in this lot that went with the engines?

A. I went down with my finger, this and this and this (demonstrating).

Q. You pointed out the various items?

A. Yes.

Q. Was there any discussion of these universal joints?

A. No. There was discussion about the chess wagons, about what kind of equipment that was.

Q. No discussion about the joints?

A. There was discussion also about the pins, counter pins, pins on the residue.

Q. Kingpins? A. Kingpins, that is right.

Q. But you don't recall any discussion as to the universal joints, is that right?

A. No, I don't. I might have said something as I was enumerating down the line.

Q. I don't want to know what you might have said, but what is your best recollection of what you said and what he said?

Defendant's Exhibit No. 15—(Continued)

A. Pardon me for thinking, but it is a long time ago.

Q. I know it is a long time ago and it is hard to remember these things.

A. I won't make a definite statement because I can't recall exactly what was said.

Q. The only thing you remember is that he didn't know what he would do with the junk, but you don't know what he meant by junk.

A. No, except that he was referring to other than the engines, since my specific idea was on the engines.

Q. Did he make any definite statement that he considered all of these other goods worthless?

A. Just reference to the junk part was all.

Q. Did you have any reason to doubt his good faith?

A. No, because he had previously purchased automotive equipment.

Q. From you? A. From Mr. Peterson.

Q. Now, was that the extent of your conversations with him?

A. As far as I can swear to, yes.

Q. Did you then reach any agreement on the price?

A. No. I introduced him to Mr. Burgoyne.

Q. Did you then absent yourself or did you stay there?

A. No, I went on about my business, other business than that, since at the time it was immaterial to me whether he got it or not.

Defendant's Exhibit No. 15—(Continued)

Q. Did you ever read this Special Offering No. C-286? A. Completely?

Q. Well, had you read it either thoroughly or casually at or prior to October 30th, 1946?

A. To what extent do you mean casually or thoroughly?

Q. Well, did you know what the various items were that were included in the residue?

A. I knew, yes, at the time the bid opening was closed what they were.

Q. Do you think they were all automotive items?

A. Yes, sir.

Q. Do you think that the chess wagon is automotive?

A. Yes, sir, it comes under the standard commodity class of automotive.

Q. Do you think these airplane jacks were automotive equipment? A. Yes.

Q. Even though they are located at Pendleton Army Airfield, some of them?

A. That is right.

Q. Did you know that some of these goods were located at a shipyard?

A. I know now, but I don't know if I knew it then.

Q. At that time had you ever seen or had any knowledge as to the construction of a marine universal joint? A. I have never seen one before.

Q. Well, did you know what they were, how they were built? A. At that time?

Q. Yes.

Defendant's Exhibit No. 15—(Continued)

A. No, sir, except that they were a Jeep engine universal joint.

Q. Why did you think they were Jeep engine universal joints rather than some other type of universal joint?

A. Well, that is what I thought.

Q. What is the basis?

A. Because it came under the automotive branch.

Q. There are a lot of things other than Jeeps in this.

A. Well, as far as Jeeps may go—they may have been Dodge, but that is what they were—they might have been marine, under a Duck or something.

Q. Now, did you ever make a statement to Mr. Jones that these gears were in a shipyard?

A. No, sir.

Q. Did you ever make any statement to him as to what he might do to dispose of them?

A. No, sir.

Q. Did you ever tell him he might sell them to some shipyard back East still operating?

A. No, sir.

Q. Are you positive of that? A. Yes, sir.

Q. Did you hear anyone else make such statements to Mr. Jones? A. No, sir.

Q. As far as you recall there was no specific discussion between you and Mr. Jones of these universal joints, is that right? A. No, sir.

Q. Do you know anything about the handling of

Defendant's Exhibit No. 15—(Continued)

this sale at the time when you took Mr. Jones to Mr. Burgoyne and introduced him?

A. After the sale had been consummated I was sitting at my desk working and Mr. Burgoyne told me to write up the sales memo, and I gave instructions to the stenographer and she typed up the sales memo.

Q. Did you have anything else to do with the sale? A. I think that—

Q. When you speak of the sales memorandum, I hand you a document marked as Form WAA2A. is that the form that you speak of?

A. That is right. This is only a copy. It has three parts. This is the original, B and C.

Q. Now, is that typed at the same time as Form WAA-1?

A. No, that is a form which is made by the commodity division and sent to the WAA-1 sales document.

Q. Did you do anything other than type this?

A. I didn't type it. The stenographer typed it.

Q. Did you initial it? A. No, sir.

Q. Do you know whose initials these three are (indicating)? A. No.

Q. On the face of that document, WAA2A?

A. No. It would have to be a process of elimination.

Q. Is there anyone out there with the initials A. Z.?

A. Not to my knowledge now. There may have

Defendant's Exhibit No. 15—(Continued)
been at that time. There has been a reduction of staff.

Q. Is there anyone out there with the initials R. B., was there? A. I can't think of any.

Q. Is this Mr. Burgoyne's signature on the back of that document?

A. No, that is Mr. Peterson's.

Q. I am asking you if this first signature is the signature of W. J. Burgoyne.

A. When it comes to signatures I wouldn't swear to it.

Q. Well, is that the name W. J. Burgoyne?

A. That is the correct spelling of W. J. Burgoyne.

Q. All you are saying is you don't know whether he wrote that himself?

A. That is right.

Q. By that signature on the back of this Form WAA2A, does that purport to approve the transaction covered by that document?

A. That is right, by the automotive branch.

Q. Well, is this the name Louis A. Zanon?

A. That is right.

Q. And that purports to signify his approval, is that your understanding?

A. That is right.

Q. What is his capacity, or what was his capacity?

A. At that time I think he was assistant to the Deputy Regional Director.

Defendant's Exhibit No. 15—(Continued)

Q. Who was the Regional Director.

A. Mr. C. T. Mudge.

Q. Who was the Deputy Regional Director at that time? A. Mr. Morton.

Q. Was Mr. Morton there at that time?

A. At the time of what?

Q. Of this sale.

A. In his office, do you mean by that, or present at the negotiation?

Q. No. Was he in his office?

A. I don't remember.

Q. Who was the Regional Deputy for Disposal?

A. Mr. Morton.

Q. Mr. Morton. Now, Mr. Webb, have you ever seen Daily WAA Bulletin No. 8?

A. Three or four of those come through the office at a time.

Q. Do you have any special recollection of this one? A. No, I don't.

Q. Among other things, this Bulletin No. 8 purports to state the limitation and delegation of authority by the Regional Director. Do you know what those limitations were?

A. No, and may I state that at that time I was really a new employee at that place. I was a clerk-typist and I knew nothing of procedures.

Q. Had you been given any instructions as to the limitations?

A. No, sir. I was a clerk-typist, not a salesman, so those didn't come over my desk at the time.

Defendant's Exhibit No. 15—(Continued)

Q. You have no knowledge of these limitations?

A. Since I was not a salesman I didn't deem it necessary to know.

Q. But you were sent to discuss this matter with Mr. Jones, were you not?

A. I was what, sir?

Q. You were sent to discuss this matter with Mr. Jones, were you not?

A. I was sent to——

Q. Discuss this sale with Mr. Jones.

A. No. Mr. Jones came to me.

Q. I mean when Mr. Jones came to the office out there someone asked you to take care of Mr. Jones.

A. That is right.

Q. Did you tell Mr. Jones that you were just a clerk?

A. I didn't make any statement as to clerk, salesman or anything else. I told him I was there to help him as to the availability of any equipment that he may desire.

Q. And you told him this equipment was available?

A. Yes.

Q. When did you learn of these limitations on the authority to make sales?

A. During the period of time that I became a salesman.

Q. Were you given instructions when you first became a salesman?

A. Pertaining to what, sir? Pertaining to these limitations?

Defendant's Exhibit No. 15—(Continued)

Q. Yes.

A. Not specific limitations, just what I picked up.

Q. How many of these daily bulletins were there? A. Per day?

Q. Oh, at the time that you became a salesman.

A. Oh, I imagine—they came in periodically across the desk for you to initial and read. I imagine there must be—two one day and none the next, and three the next, and none the next two days.

Q. What happened to them after they came across your desk for initialing?

A. They were sent back to the originating unit in disbursement.

Q. Were they then filed? A. Yes, sir.

Q. When you became a salesman were you shown all of the past daily bulletins with instructions? A. No.

Q. When did you become a salesman?

A. Approximately six months after my employment, which was August.

Q. 1946?

A. I may say that I became not a salesman, but a sales expediter.

Q. Do you have any further personal knowledge of this transaction other than what you have stated here?

A. Yes, that Mr. Burgoyne instructed me, after he found out what they were, to phone Mr. Jones

Defendant's Exhibit No. 15—(Continued)
to come into the office the following Monday, which I did, and he was not there. His mother said he was taking delivery of the chess wagons and she would instruct him to come in Monday.

Q. Did Mr. Burgoyne say why he wanted to talk to Mr. Jones?

A. He mentioned something of a refusal on the delivery.

Q. Was that after the sale had been consummated and check accepted?

A. After the sale had been consummated as far as I was concerned, that I knew of.

Q. I see. I think that is all. Thank you very much.

Mr. Conklin: I don't have any questions.

(Signature waived)

LOUIS A. ZANON

an employee of plaintiff, was thereupon produced as a witness in behalf of defendant and, being first duly sworn, was examined and testified as follows:
Examination by Mr. Tongue:

Q. Mr. Zanon, would you state your full name?

A. Louis A. Zanon.

Q. And what is your present position?

A. Assistant Deputy Regional Director in charge of disposals.

Q. What was your position at that time?

A. Acting Assistant Regional Director in charge of disposals.

Q. You were Acting Chief Regional Deputy in

Defendant's Exhibit No. 15—(Continued)

charge of disposals at the time this sale was made, is that right? A. That is right.

Q. I will hand you this document marked, designated as Form WAA2, purporting to relate to a sale to Herbert A. Jones of certain items including certain universal gear joints, and I ask you if that is your signature on the back of that document.

A. It is.

Q. By signing that document did you give your approval to that sale? A. No, sir.

Q. What does that signature then mean?

A. That signature indicates that it would have been approved if the sale had been consummated just the way it specifies on the front of that WAA2, which it wasn't.

Q. When did you place your signature on this document?

A. Well, I would have to go through the entire procedure of what WAA2, the steps WAA2 takes in the preparation of the WAA2.

Q. Well, I assume from what Mr. Webb has said that this WAA2 was made up after the negotiations with Mr. Jones, between him and Mr. Webb and Mr. Burgoyne. That would be true, would it not, that WAA2 would have been made up after?

A. That is correct.

Q. All right. Do you want to make any further explanation, then?

A. Yes, I would be glad to make further explanation.

Defendant's Exhibit No. 15—(Continued)

Q. Go right ahead.

A. The procedure that we followed at that time in the War Assets Administration, when the material was put on a sealed bid or a fixed price we use what we call a WAA4, which was a programming piece of paper that indicates to us what we have available, and it is either the determination, the determination is made to put it on either a fixed price or sealed bid and it goes out to the public as sealed bid or fixed price. We have what we call an Award Committee that allocates this material and priority sequence, providing that the price justifies.

This particular sale, the front of it, if you will notice it there, indicates that it was awarded by the Award Committee, and all sales came across my desk at that time and that was the only thing that we ever look for is the type of sale, whether it was a bid sale, fixed-price sale or negotiated sale. If this sale had indicated a negotiated sale there would have been more questions asked than were asked on this one. We didn't hesitate to sign when the face of the document indicates that it was a sealed bid or fixed-price.

Q. Ordinarily, Mr. Zanon, when you sign one of these documents does that indicate your approval of the sale contained therein?

A. It would indicate the approval of the sale as indicated on the face of that document.

Q. Yes. In other words, by signing this docu-

Defendant's Exhibit No. 15—(Continued)

ment you purport to give your approval to the sale on the terms stated in that document?

A. Not the terms, but the conditions.

Q. Terms and conditions?

A. Well, let's say conditions.

Q. Is there any difference between terms and conditions?

A. I think so. We can't look over every one of those documents. We have two or three thousand of those coming across the desk at one time.

Q. Now, where does it show that this was——

A. It shows that it was, the type of sale, that the type of sale was a bid method.

Q. I see.

A. That it was on Program C-286.

Q. That means Special Offering 286?

A. That is right.

Q. But it also shows the total price?

A. That doesn't mean anything. That doesn't mean anything; that means to me when I look at this that the Award Committee has——

Mr. Webb: May I add——

Mr. Tongue: Just a minute.

Q. In other words, you are not denying that this \$69.13 was there at the time you signed it?

A. I don't know that it was. Most of them in most cases, they are not. It may have been there and may not. In most cases we just get a skeleton form, just giving the page and line number, no

Defendant's Exhibit No. 15—(Continued)
description or price or anything else. This is what we look at (indicating).

Q. You give a blank check approval if it has been indicated on this form that it is a bid sale?

A. And closed on a regular offering, yes, sir. There is no reason to do otherwise.

Q. Then you don't claim that you even read the rest of this document when you signed it?

A. No, I wouldn't say that I did. I don't believe that I did. It would take me forever to read just one day's documentation.

Q. But, at least, you approved of the sale of those items, although you assumed that the sale was to be on a bid under these terms that you speak of?

A. Under the terms set down by the rules and regulations given to us by Washington.

Q. By signing it you thought you were approving the sale under those conditions, is that correct?

A. Correct, sir.

Q. You didn't know that you were giving your approval to a sale on other conditions?

A. That is right.

Q. Now, Mr. Zanon, did you ever meet Mr. Jones or ever see him?

A. The first time I saw Mr. Jones he was brought to my desk, I believe by Mr. Webb or Mr. Burgoyne. I don't know just which one. He was introduced as Mr. Jones to me, as a man that bought some universal joints. At the time, of course, it was all Greek to me and I didn't know—

Defendant's Exhibit No. 15—(Continued)
and Mr. Jones explained that he had entered into negotiation with the automotive section on some \$60,000 worth of equipment—

Q. Did he say that? A. Yes.

Q. What did he say, now? I am asking you to state what he said to you or in your presence.

A. Mr. Jones was brought to my desk. He said, "I bought a bunch of universal joints and a bunch of bodies and a bunch of motors," and I said, "How many?" And he said, "\$60,000"—he didn't tell the exact figure—I said, "What did you pay for it?" and he gave me the figures and it was in the sixties.

Q. \$60, you mean?

A. \$60 or \$65. I haven't looked at the face of that document to see what it is. And I asked how he happened to buy them and he explained to me he walked into the office looking for automotive equipment and was sent to the automotive section.

I excused myself and went back to the automotive section and discovered that Mr. Williams, who was then with the War Assets Administration, had instructed the boys to accept an offer on the residue on this sealed bid.

Q. At what price?

A. He didn't specify the price. To accept an offer, to obtain offers on them, and that Mr. Gibson or the U. S. Maritime Commission had refused a shipment.

Q. Well, now, let's fix a time when he came to

Defendant's Exhibit No. 15—(Continued)

see you, when Mr. Jones first came to see you. Is that when Mr. Webb or Mr. Burgoyne brought him over at the time of the sale?

A. No. He had already picked up part of this material and he had been refused shipment on the other.

Q. Well, now, did you ever see him prior to that time?

A. Never met the man. I don't believe I would know him if he walked in this room. And he was very indignant——

Q. Just a moment. Did you have anything to do with authorizing the sale of the residue at a negotiated price?

A. I would have had, yes, if it would have been returned to my desk and the analysis of the material had been made.

Q. Well, did you know there was a residue remaining after this special offering?

A. No, sir.

Q. Did you know that that had been offered as residue for a negotiated price? A. No, sir.

Q. When did you first learn that?

A. When Mr. Jones attacked me about it.

Q. Was that after you placed your signature on these Forms WAA2?

A. It must have been, yes.

Q. Did Mr. Burgoyne discuss the sale to Mr. Jones with you at any time prior to the time that Mr. Jones came in? A. No, sir.

Defendant's Exhibit No. 15—(Continued)

Q. Are you positive of that?

A. I am positive of that.

Q. What did Mr. Jones say to you on that later occasion?

A. After I had got through talking to the boys back in the automotive section I came back to my desk and told Mr. Jones that I felt that there was a serious mistake made, although he had his documents and had paid for the material I felt only the right thing for him to do was to surrender those documents.

Q. Was Mr. Mudge apprized of this controversy at that time? A. At that time?

Q. Yes.

A. No, it hadn't reached Mr. Mudge's office yet.

Q. When was he apprized of that?

A. Well, I believe it was some time later when the attorneys got into it, Mr. Stocklen got into it, and Jones was back the second time a couple of days later, or maybe the same day.

Q. What else did Mr. Jones say to you at that time?

A. That he intended to get this material. And I said, "Mr. Jones, at the time you were making this sale did you know you were buying an enormous amount of material for that much money?" He says, "I sure did, and I intend to get this," and I says, "Well, I don't know just how you are going to go about it"; I said, "they have refused to ship, and justly so, but if you care to come back

and talk with our attorney, I think this is a matter for him to discuss.”

Q. Did you have any further discussions with Mr. Jones?

A. That was all. I did meet him in the hall the following day and he said he had an attorney. I just met him in the hall and he said, “I just hired myself an attorney and he will be out here this afternoon,” the following day or a day or two later.

Mr. Tongue: I think that is all.

Mr. Conklin: I have no examination.

Mr. Tongue: Mr. Webb and Mr. Zanon, you may, if you desire, see a transcript of your depositions and sign them; however, you also may waive the reading and signing.

Mr. Zanon: I will waive my reading and signing of the transcript.

Mr. Webb: The same; I will waive mine, too.

(Depositions concluded.)

In the District Court of the United States
for the District of Oregon

No. Civ. 3916

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

HERBERT A. JONES, JR.,

Defendant.

State of Oregon,

County of Multnomah—ss.

I, the undersigned, Glenn G. Foster, a Notary Public for Oregon, do hereby certify that on Friday, the 12th day of December, A. D. 1947, before me as such Notary, at Room 510, United States Court House, in the City of Portland, County of Multnomah, State of Oregon, personally appeared, pursuant to the oral stipulation set out on page 2 of the foregoing transcript, Delbert F. Webb and Louis A. Zanon, employees of plaintiff; Gene B. Conklin, Esq., Assistant United States Attorney, appearing in behalf of plaintiff, and Thomas H. Tongue, Esq., appearing in behalf of defendant; and the said witnesses being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, in answer to oral interrogatories propounded by the attorney for said defendant, testified as in the foregoing annexed depositions, pages 1 to 30, set forth.

I further certify that all interrogatories propounded to said witnesses, together with the answers of said witnesses thereto and all objections and motions taken or made, and other proceedings occurring upon the taking of said depositions, were then and there taken down by me in shorthand and thereafter reduced to typewriting under my direction, and that the foregoing transcript, pages 1 to 30, both inclusive, constitutes a full, true and accurate transcript of said depositions and proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof; and that the submission of the depositions, when fully transcribed, to the witnesses for examination and reading to or by them and opportunity to the witnesses to make any changes in form or substance and signing of same by the witnesses were waived by the witnesses and by the parties.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the action.

In Witness Whereof, I have hereunto set my hand and notarial seal this 18th day of December, A. D. 1947.

/s/ GLENN G. FOSTER,
Notary Public for Oregon.

My commission expires Dec. 30, 1949.

[Endorsed]: No. 11963. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Herbert A. Jones, Jr., Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed July 1, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11963

UNITED STATES OF AMERICA,
Appellant,
vs.
HERBERT A. JONES, JR.,
Appellee.

STATEMENT OF POINTS ON WHICH THE
APPELLANT INTENDS TO RELY ON
APPEAL AND APPELLANT'S DESIGNA-
TION OF RECORD FOR PRINTING

Comes now the United States of America, appellant named above, and for a statement of points on which appellant intends to rely on this appeal says:

The statement of points to be urged by appellant in this Court are the same as those set forth in the

statement of points filed with the District Court pursuant to Rule 75(d) of the Federal Rules of Civil Procedure.

Appellant designates for printing the entire record filed with this court except Plaintiff's Exhibits Numbers 6A, 6B, 6C, and 6D, Universal Gear Joints, of which reproduction is impractical; and requests that said exhibits be considered in their original form.

Dated this 13th day of July, 1948, at Portland, Oregon.

/s/ HENRY L. HESS,
United States Attorney for
the District of Oregon.

/s/ VICTOR E. HARR,
Assistant United States
Attorney.

/s/ GENE B. CONKLIN,
Assistant United States
Attorney.

[Acknowledgment of service attached.]

[Endorsed]: Filed July 16, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER THAT ORIGINAL EXHIBITS NEED
NOT BE PRINTED

Good cause therefor appearing, Ordered that the original exhibits in above cause need not be printed, but may be considered by the Court in their original form.

WILLIAM DENMAN,
Senior United States Circuit Judge.

Dated: San Francisco, Calif., August 10, 1948.

[Endorsed]: Filed Aug. 10, 1948. Paul P. O'Brien,
Clerk.



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vs.

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BRIEF FOR APPELLANT

On Appeal From
The District Court of the United States
For the District of Oregon.

HENRY L. HESS,
United States Attorney.

VICTOR E. HARR,
GENE B. CONKLIN,
Assistant United States Attorneys,
506 United States Court House,
Portland, Oregon,
Attorneys for Appellant.

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VICTOR E. HARR,
GENE B. CONKLIN,
Assistant United States Attorneys,
506 United States Court House,
Portland, Oregon,
Attorneys for Appellant.

JURISDICTION

This is a suit brought by the United States to rescind a sale of surplus property and to have it set aside as void, and for a declaration of the rights of the parties. The jurisdiction of the District Court rested upon Title 28, U.S.C., Section 41. Memorandum Opinion was rendered on February 20, 1948, denying the relief sought (R. 33), and on March 4, 1948, judgment was entered in favor of defendant and dismissing plaintiff's complaint (R. 38). Notice of appeal was filed April 30, 1948 (R. 39). The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 225 (a).

QUESTIONS PRESENTED

1. Whether a sale of certain surplus universal gear joints with a declared value (original cost) of \$62,000.00 and a scrap value of \$2,260.00 is void, where said gear joints were purchased with other property for a total purchase price of \$75.00, which was determined by negotiation, and an apportioned purchase price of the gear joints of \$69.13, where the agent of the War Assets Administration negotiating the sale had authority to close sales on a bid basis of property of a declared value of not more than \$50,000.00, where such sale was approved by an agent of the War Assets Administration having authority only to approve sales on a bid basis for property of a declared value of not more than \$100,000.00, and where the agent intended

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UNITED STATES OF AMERICA, Appellant

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HERBERT A. JONES, JR., Appellee

Insert for BRIEF FOR APPELLANT (To be inserted
at Page 16 preceding "ARGUMENT")

SPECIFICATION OF ERRORS

The District Court erred—

1. In making Findings of Fact insufficient to resolve any of the issues raised in the pleadings and pre-trial order and tried.
2. In making Findings of Fact which do not support its Conclusions of Law.
3. In dismissing the action for want of equity.
4. In holding and concluding the plaintiff not entitled to the relief prayed for.
5. In holding and concluding the plaintiff not entitled "to rescind said sale".
6. In holding and concluding, if it so held and concluded, that the transaction between the defendant and the plaintiff's agents resulted in a valid sale.

7. In holding and concluding that the plaintiff was not entitled to a decree declaring the rights and duties of the defendant and the plaintiff under and by virtue of any agreement arising under transactions between defendant and plaintiff's agent or agents.

8. In holding and concluding that the plaintiff was not entitled to a declaration by the Court that the purported sale be void and the plaintiff owner of the property purportedly to have been sold.

9. In holding and concluding that the plaintiff was not entitled to a decree by the Court vacating, setting aside and rescinding the purported sale between the defendant and the plaintiff.

10. In making Findings of Fact and Conclusions of Law which do not clearly show basis for the decision.

to approve a "bid" sale as shown on the sales memorandum on which he signified his approval.

2. Whether the sale of surplus property by agents of the War Assets Administration for \$75.00, which included certain new universal gear joints of a declared value (original cost) of \$62,553.45 and a scrap value of \$2,260.00 should be rescinded in whole or in part, where the buyer knew the nature and use of the gear joints (R. 139), and knew the gear joints contained a high percentage of bronze, the approximate weight of the gear joints and the approximate worth of the bronze (R. 146), and where the agent making the sale thought the gear joints were automotive equipment and not marine equipment (R. 84).

3. Whether the United States is entitled to a decree, declaring the rights and duties of the United States and the appellee, which arose out of transactions between agents of the War Assets Administration and the appellee, which transactions the appellee claims resulted in the sale of surplus property and where the United States maintains the sale was void or voidable.

4. Whether there is sufficient evidence in the case warranting the Court's dismissing the government's suit for want of equity.

5. Whether the findings of fact and conclusions of law resolve the issues raised by the pleadings and pre-trial order

and show the basis for the decision and whether the findings of fact support the conclusions of law.

STATEMENT

This is an appeal from a judgment in favor of the appellee in a suit brought by the United States to set aside and rescind a purported sale of surplus property by the War Assets Administration to the appellee, on the grounds of mutual mistake, unilateral mistake and want of authority, and also praying for a declaration of rights and duties of the parties (R. 2-27, 38).

The suit was tried upon issues set out in a pre-trial order, which was not signed by the Court (R. 48), although the Court said at trial that the pre-trial order would be signed (R. 51). The pre-trial order was signed by counsel and submitted to the Court but was not forwarded to the Circuit Court of Appeals by the Clerk of the District Court as part of the transcript of record. The pre-trial order, as submitted, is set out in the Appendix, *infra*, pp.

The facts as agreed in the pre-trial order may be summarized as follows:

In May or June 1946, certain universal gear joints, described as Lot Nos. 27, 28, 29 and 30 in plaintiff's Exhibit No. 1, were declared surplus property to the War Assets Administration by the United States Maritime Commission,

and later, the War Assets Administration undertook to dispose of the universal gear joints under the Surplus Property Act and regulations and orders promulgated thereunder. The universal gear joints were designated for disposition by the Automotive and Machinery Sales Division of the War Assets Administration, which listed the universal gear joints with other property upon Special Offering C-286 (plaintiff's Exhibit No. 1). The special offering was circulated to persons dealing in hardware, machinery, farm implements and scrap, and to interested veterans who had placed their names of record, but bids were invited thereon. The gears were fully described in the special offering and were shown to be located at Oregon Shipbuilding Corporation, Portland, Oregon. However, no bids were received on the universal gear joints and other items. The residue of unsold items were Lot Nos. 1, 2, 3, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32. Besides the universal gear joints, the residue consisted of one dump truck body (item 1), 12 brass plug coils (item 2), 2 jeep motors (item 3), 104 King pins for trailer hitches (item 23), 3 Norgren lubricators for circulating pumps (item 25), 240 miter gears (item 26), and two chess wagons (items 31 and 32). The Special Offering No. C-286 was dated October 4, 1946 and called for sealed bids to be received by the War Assets Administration office, Portland, Oregon, by 2:00 P. M., October 24, 1946 (plaintiff's Exhibit No. 1). On or about October 30, 1946, the appellee made an inquiry of a salesman of War Assets Administra-

tion as to whether there were any jeep motors for sale and was informed that there were available for sale two jeep motors but it would be necessary to purchase the entire unsold residue of Special Offering No. C-286 (plaintiff's Exhibit No. 1). After considerable discussion, the salesman offered to sell all of the residual items to the appellee for \$75.00 and the appellee agreed to buy these items at that price and later paid the sum of \$75.00 to the War Assets Administration.

A sales memorandum, Form WAA-2a (plaintiff's Exhibit No. 3), was later issued to the appellee covering the purported sale. The appellee was permitted to take delivery of all of the residual items, excepting Lot Nos. 27, 28, 29 and 30, being the said universal gear joints. The War Assets Administration and United States Maritime Commission refused delivery to the appellee of the said universal gear joints when demand was made for delivery thereof on or about November 12, 1946. On or about September 26, 1947, at the time of filing the complaint herein, the United States tendered to the appellee the sum of \$69.13, being that portion of the sale price apportioned to the universal gear joints, which tender was rejected by appellee and paid into the registry of the District Court of the United States for the use of the appellee.

Other facts pertinent to the case are as follows:

The original complaint was filed on September 26, 1946,

asking only for rescission of the sale upon the ground of mutual mistake (R. 2-18). With leave of the Court on December 4, 1947, the United States of America filed an amended complaint, seeking to rescind and set aside the sale on the grounds of (1) mutual mistake, (2) unilateral mistake, (3) lack of authority by agents negotiating sale, and (4) sale of such an unfair price was in violation of the Surplus Property Act of 1944, and hence beyond the power of War Assets Administration's agents. Each of the foregoing grounds was set forth in a separate cause of action, the first cause of action being identical with the original complaint. In addition to a decree requesting rescission of the aforementioned purported sale, apparently referring to the entire sale—the amended complaint prayed for “a declaration of the rights and duties of the parties hereto under and by virtue of any agreement arising under the aforementioned transaction between the plaintiff's agent or agents and the defendant”. In the second cause of action, it was alleged that tender of the full purchase price of the purported sale would have been futile.

The case went to trial upon the facts and issues as set out in the pre-trial order, Appendix, *infra*, pp., on December 22, 1947. The relief prayed for in the pre-trial order, which stated that said order superseded pleadings, was for the declaratory relief as requested in the amended complaint, rescission of the entire sale, and that the appellee

be reimbursed in the sum of \$75.00 and that all items delivered to appellee by appellant be restored to appellant; or, in the alternative, "if defendant is put to a hardship to restore the parties to status quo by a redelivery to plaintiff of the items delivered to him, then, if defendant elects to retain all items delivered, defendant should be reimbursed in the sum of \$69.13, the amount paid by him for the said Universal Gear Joints."

The bills of sale and WAA's memoranda of the transaction, Form WAA-2a, were given in evidence. Separate sales memoranda and bills of sale were prepared for each of the items included in the sale except the gear joints, one sales memorandum and bill of sale being prepared for all of the gear joints. All of the bills of sale, except that covering the dump truck body, and all sales memoranda, except the sales memorandum relating to the gear joints, state on their face: "Following Sales memo numbers on attached WAA-2's constitute one complete lot at a total selling price of \$75 (numbers of all sales memos included in sale.)" The apportioned prices of the various items computed according to their respective declared values appear on the respective bills of sale and sales memoranda, the price shown for the gear joints being \$69.13. (Plaintiff's Exhibit No. 3 A to I).

Upon being refused delivery of the universal gear joints, the appellee, Jones, notified War Assets Administration

that he was engaging an attorney to protect his interest (R. 114). Mr. C. T. Mudge, Regional Director of War Assets Administration, Portland, Oregon, on December 4, 1946 addressed a letter to Neal W. Bush, who was the appellee's attorney, notifying the appellee that the War Assets Administration was rescinding the sale (Defendant's Exhibit No. 18).

The appellee, Jones, testified that he had first been offered by telephone the residual items which remained unsold in Special Offering No C-286 for \$900.00, later for \$250.00, and on the date of sale for \$75.00. Jones' first conversation on the date of the sale when he appeared in person at the War Assets Administration office was with one D. F. Webb, a clerk-typist in the Automotive and Machinery Division. He stated to Webb his main object was to obtain the jeep motors and was informed by Webb it would be necessary for him to take all the residual items in order to purchase the jeep motors. Webb went over the description of each item on the Special Offering No. C-286 with Jones, pointing out the residual items (R. 127-129).

Webb's testimony was that the original decision that the residue should be sold in a lot was made by one Williams, Chairman of the Board of Awards, who had charge of opening the bids in the first instance. Williams fixed no price but directed the lot be sold for the best price which could be negotiated (R. 73, 215). Webb had no authority

to make the sale and referred Jones to William J. Burgoyne, Acting Chief of the Automotive Division, who concluded the sale with him (R. 70, 130). Burgoyne was unable to remember all of the details of his conversation with Jones (R. 90).

It was the testimony of both Webb and Burgoyne that they were unfamiliar with marine equipment of this type and that they thought from the description of the universal gear joints that it was automotive equipment, particularly since it had been referred to the Automotive and Machinery Sales Division for sale (R. 68, 69, 86, 223).

Jones testified that he had had experience in a shipyard and had, prior to the sale, installed gear joints of this type and knew their nature; that they were not manufactured "very cheaply because of their nature"; that he knew the universal gear joints contained a high percentage of bronze; that he knew the approximate weight of the gear joints and the approximate worth of the bronze (R. 129, 130). Webb testified that in his conversation with Jones concerning taking all of the residual items rather than just the two jeep motors, Jones told him that he did not want to buy a "bunch of junk". There was no specific reference as to what Jones meant by "junk" but Webb, from the conversation, understood it to mean the items other than the jeep motors (R. 68, 69, 220-222).

After the purported sale was consummated by Mr. Burgoyne, Mr. Webb instructed a typist to fill out the bill of sale and memorandum of the transaction, Form WAA-2a (Plaintiff's Exhibit 3 A to I) (R. 74). Although Mr. Burgoyne did not recall the details of the transaction at the time, he stated that it was the office procedure that Form WAA-2a was referred to Louis A. Zanon, Acting Assistant Deputy Regional Director (R. 90, 91, 118, 119). The Form WAA-2a (Plaintiff's Exhibit 3 A to I) shows the signature of Louis A. Zanon as having approved the sale.

The War Assets Administration, at the time of this purported sale, had three different methods of selling goods—fixed price sales, sales with prices based on competitive bidding and sales where the price was fixed by negotiation. C. T. Mudge, Regional Director of the Portland office, testified that the authorizations given by him to the members of his staff were limited to sales made on a fixed price or bid basis and that he alone had authority to execute a sales contract where the price was determined by negotiation with the buyer (R. 163). Where a sale was offered by bid, the price at which the commodity was sold was determined by the Board of Awards, which determine the successful bidder in accordance with upset prices. Where the sale was fixed price, the price of the commodity was previously fixed by the Board of Awards or Regional Director (R. 58, 114-116, 124).

Mudge testified that his agency was discouraged in the making of negotiated sales and that negotiated sale procedure was "hemmed in with countless regulations"; that it had to pass through "the Regional Review Board and Board of Allocation Awards, and so forth, and finally comes up to the Regional Director for final approval" (R. 163).

Zanon testified that since the face of the form of bill of sale, Form WAA-2a (plaintiff's Exhibit No. 3 A to I), indicated that the type of sale was *bid* upon Special Offering No. C-286 (Plaintiff's Exhibit No. 1), he authorized the sale of the material on a bid basis under a regular procedure of a competitive bidding program, and had the form shown the sale to be "negotiated", he would have inquired into the transaction (R. 111, 112, 119). He also stated that that form indicated to him that the price had been determined under the normal procedure by the Board of Awards (R. 111). As to the value of the universal gear joints at the time of the sale, the appellee testified that he did not know the exact value but did know the approximate weight of the gears, the approximate worth of the bronze and that the gears contained a high percentage of bronze (R. 129, 130). Zanon testified that the gear joints contained a high percentage of brass or bronze and according to his computation, the scrap value of the universal gear joints at the time of the sale was \$2,260.00 (R. 109, 118). Upon cross-examination, Zanon testified that since the

scrap value was \$2,260.00, it would not have been necessary for the War Assets Administration to sell the universal gear joints at a price less than the scrap value. Zanon also testified that when conversing with appellee Jones after the government had refused delivery, Jones told him he had purchased \$60,000.00 worth of equipment for \$75.00 and that he knew at the time of the sale that he was getting an exceptional bargain (R. 113-114). Jones stated, however, that the figure of \$60,000.00 was used as the amount he was advised was the cost to the government of the universal gear joints (R. 136).

The Court excluded evidence showing that it was the custom and practice of the War Assets Administration regional office to sell property at prices a fraction of the cost and value (R. 77). However, some evidence was admitted to show the custom and practice on the issue of appellee's good faith (R. 166).

On February 20, 1948, the Court rendered a written Memorandum Opinion as follows (R. 33):

"Seeking to avoid the difficulties attendant on rescission of a sale of personal property, where partial delivery has been made, the plaintiff insists that this contract is severable. But it is not severable. On the contrary, it was a sale by lot, and the seller insisted that it be that way. The relief sought is, therefore, denied."

On March 1, 1948, the Court entered Findings of Fact

and Conclusions of Law (R. 33-38). The Court found that the War Assets Administration issued instructions that the residue of the Special Offering No. C-286 (Plaintiff's Exhibit No. 1) "be placed on sale at the best price offered; and a reasonable test of the market had been made by the plaintiff before said goods were sold to defendant" (R. 34); that at the time of the sale, both appellant, its agents and appellee were familiar with the nature of these items (R. 34); that "there is no substantial evidence to establish the value of said items at the time of the sale other than that the value of said items and in particular of said universal gear joints, was substantial, but that the exact value of said goods was questionable and speculative, which said facts were recognized both by plaintiff, its agents, and defendant and all of said negotiations, including the determination of said price and their subsequent sale, were the deliberate and intentional acts of plaintiff, its agents, and defendant, and the means of information as to the value of said goods were open alike to all of said parties" (R. 34, 35).

The Court found further that "no mistake was made by either plaintiff, its agents, or defendant as to the identity, nature or value of said items, nor was there any mistake that determined the conduct of either plaintiff, its agents, or defendant, nor did defendant have any knowledge or reason to know that plaintiff or its agents made any such mistake or lacked authority to make said sales"; that the

appellee acted in good faith at all times; that on November 6, 1948, WAA "executed and delivered" to appellee a "bill of sale purporting to transfer title of" all said items (R. 35).

The Court also found that appellant delivered all of the items other than the universal gear joints to the appellee, continuing to deliver other items to him after it had refused to deliver the universal gear joints; that the "sale was not severable, but by choice of plaintiff all of said items were sold at a single lot"; that appellant, at the time of filing the original complaint tendered to appellee the apportioned purchase price of the gear joints, but has not tendered the balance of the purchase price paid for the other items; that "it has not been shown that defendant is still in possession of said items; that it would be possible to restore the status quo or that defendant would not be prejudiced by (rescission of the entire sale)." (R. 36, 37.)

Further, the Court found that on December 28, 1946, the appellee filed action for replevin in the state court against the Regional Director of War Assets Administration, and the custodian of the universal gear joints and that the goods were removed immediately "by plaintiff's agents" to the State of Washington and were moved to a military reservation after the custodian had been joined as party defendant in the state suit (R. 36).

The conclusions of law of the Court were that "plaintiff

is not entitled to rescind said sale or to the other relief prayed for by plaintiff herein, and the action should be dismissed for want of equity". (R. 37, 38).

Judgment was entered for the appellee on March 4, 1948, dismissing the appellant's complaint (R. 38).

ARGUMENT

I

Sale of universal gear joints was void ab initio because the employees and agents of the War Assets Administration who negotiated with appellee and the officer making the approval were without authority to act.

A. There was no specific authority given to the agent dealing with appellee to make the sale of the universal gear joints.

The uncontradicted evidence showed that only Mudge had authority to make a negotiated sale; that the authority delegated to his subordinates was limited to sales on a bid or fixed price basis. (R. 58, 114-116, 124, 163.) Clerk Typist Webb, with whom appellee Jones first talked concerning the universal gear joints and the other residual items had no authority to make any sale and Burgoyne, Chief of the Commodity Branch, was limited to making sales on a fixed or bid basis to the amount of \$50,000 declared value. (R. 60, 82, 163.) The declared value of the goods in this case, universal gear joints, was over \$62,000. (R. 56.) The

authority of Deputy Regional Director Zanon, who approved the sale, was limited to \$100,000 declared value upon sale where the price was determined on a bid or fixed price basis. (R. 61.)

It is elementary that an agent who is authorized to sell property in a specific manner as by bid has no authority to sell it in any other manner. (Mecham Agency, 1914, Sec. 858.) The law is settled that the United States can be bound only by its agents acting within the scope of the authority to them and that persons dealing with agents of the United States do so at their own risk that the agents are acting strictly within their authority. All persons are charged with notice of limitation of the agent's authority. *Utah Power & Light Company v. United States*, 243 U. S. 389; *United States v. City and County of San Francisco*, 310 U. S. 16, 54 Am. Jur., United States, Section 92.

The evidence showed also that Deputy Regional Director Zanon did not intend to authorize and in fact could not have authorized a negotiated sale when he signed Form WAA-2A, but a bid sale. In fact, Zanon testified that if he had thought it was a negotiated sale he would have inquired into the matter to determine how it was made. (R. 111, 112, 119.) The Government was not bound by the ratification or approval of Zanon since he had not ratified a bid sale and did not have knowledge of all the facts upon which the unauthorized action of Burgoyne was taken. If Zanon had

had authority to ratify and approve a bid sale it would have to be with full knowledge of the facts.

“The rule that where the agent has acted without authority, and it is claimed that the principal has thereafter ratified this act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken, is applicable to the government as to an individual.” 54 Am. Jur. United States, Section 92 (See *United States v. Beebe*, 180 U. S. 343).

B. Sale was invalid because agent could not make sale at such an unreasonable price.

Apart from the above consideration of invalidity because of want of authority, it would appear that the sale was invalid because made at such a grossly inadequate price. Provisions of Section 2 of the Act, 50 U.S.C. App. Sup. V., Sec. 1611, are that surplus property should be disposed of at fair prices to prevent unusual and excessive profits being made out of surplus property and to obtain for the Government as far as possible a fair value of surplus property upon its disposition. (Appendix, *infra*. pp.....). A contract of purchase entered into by a Government agent providing for payment of a price which is grossly unconscionable is not binding on the Government. *Hume v. United States*, 132 U. S. 406. An agent to sell for private principal, if no price has been specified, has no authority to sell for less than the market price or if there is no market price for

less than a reasonable price. Restatement of Agency, Section 61.

Although the Government did not offer any evidence as to the market value of the universal gear joints at the time of the sale, it is clear from the evidence of Zanon that had these new universal gear joints been sold for scrap the value at that time was \$2260.00 if sold for scrap. (R. 109, 118.) The appellee testified that in his state court action for replevin he gave the value of \$31,000.00, retail, and \$6,000.00 scrap value of the universal gear joints. (R. 153.) The sale by an agent for \$75.00 of machinery of this type after an unsuccessful attempt to dispose of it in a single offering by bid sale, when the principal has indicated to him that when it was new it cost over \$60,000 and was worth that amount, would appear to be so extraordinary a transaction as to be unauthorized as a matter of law.

“Individuals, as well as Courts, must take notice of the extent of the authority of officers of the Federal Government. When dealing with such public officers, one should inquire into their powers and authorities to bind the Government, and is held to a recognition of the fact that Government agents are bound to *fairness* and *good faith* as between themselves and their principal.” (Emphasis added) 54 Am. Jur., U. S., Sec. 92.

II

The sale of new universal gear joints of the original cost and declared value of \$62,553.45, and a scrap value of \$2260.00, should be rescinded where the buyer knew the nature and use of the gear joints and knew the gear joints contained a high percentage of bronze, approximate weight of the gear joints, and approximate worth of the bronze, and where the agent of the War Assets Administration negotiating the sale thought that the gear joints were automotive equipment and not marine equipment and did not know their true value.

The original complaint in this case (R. 2) alleged that there was a mutual mistake and that the sale of the universal gear joints should be rescinded on that ground. However, at pre-trial conference the defendant for the first time put the Government on notice that he knew the nature and value of the universal gear joints. (R. 103.)

The mistake on the part of the Government's agents was that they did not know the nature or the value of the universal gear joints when they were sold to appellee Jones, while on the other hand Jones knew the nature and value of the goods. The mistake of the Government agents was material to the transaction because the universal gear joints would have not been sold at such a grossly inadequate price had the agents been aware of the value of the goods. (R. 119.)

"There are two requisite essentials in the exercise of equitable jurisdiction in giving any relief, defensive

or affirmative. The facts concerning which the mistake is made must be material to the transaction, affecting its substance, and not merely as incident; and the mistake itself must be so important that it determines the conduct of a mistaken party or parties." 3 Pomeroy's Equity, Juris. Prud. (5th ed., 1941) 333, Sec. 856. (See 9 Am. Jur, Cancellation of Instruments, Sec. 32; *Cleavland v. Richardson*, 132 U. S. 318.)

Where the buyer knows or suspects, or has reason to know the mistake of the seller, restitution is granted if the fact as to which the mistake is made is one which is at the basis of the transaction. Restatement of Restitution, Sec. 12, Comment C: See Restatement of Contracts, Sec. 503, Comment A. Mistake as to price and value is material. Restatement of Restitution, Sec. 16, Comment C.

"Where a party knows or has reason to know that another party has made a basic mistake, restitution is granted. This situation has frequently arisen where there has been an error in the price given. In this case, rescission is ordinarily allowed." Notes on Restatement of Restitution, Sec. 16, Comment C. (See: *Moffet, Hodgkins & Clark Co. v. Rochester*, 178 U. S. 373.)

The illustration under Comment C of Section 12 of the Restatement of Restitution is clearly in point in this case as a basis for setting aside this purported sale for a unilateral mistake:

"A, looking at cheap jewelry in a store which sells both very cheap and expensive jewelry, discovers what he at once recognizes as being a valuable jewel worth

not less than \$100.00, which he correctly believes to have been placed there by mistake. He asks the clerk for the jewel and gives 10c for it. The clerk puts the 10c in the cash drawer and hands the jewel to A. The shopkeeper is entitled to restitution because the shopkeeper did not, as A knew, intend to bargain except with reference to cheap jewelry."

"The following seems to be the true rationale of the doctrines concerning inadequacy of price: Whenever it appears that the parties have knowingly and deliberately fixed upon any price, however great or however small, there is no occasion or reason for interference by the courts * * *. But where there is no evidence of knowledge, intention, or deliberation by the parties, the disproportion between the value of the subject-matter and the price may be so great as to warrant the Court in inferring therefrom the *fact* of fraud. Such a gross inadequacy or disproportion would call for explanation, and will shift the burden of proof on the party seeking to enforce the contract, and will require him to show affirmatively that the price was a result of a deliberate intentional act of the parties; and if the facts do prove such action, the fact of fraud will be more readily and clearly inferred." 3 Pomeroy's Equity, Juris. Prud. (5th Ed.), Section 927, p. 637.

One of the best formulation of the rule that rescission will be granted where there is a unilateral mistake as to price is stated in the case of *Hardman Lumber Co. v. Keystone Manufacturing Company* (W. Va. 1920), 103 S. E. 282. There one lumber dealer, the plaintiff, requested and received from another lumber dealer, the defendant, the

quotation of price on a quantity of lumber to be furnished by the plaintiff to a third party. The quotation was computed on the basis of surface measurements, which represented standard practice in trade. But the contract of sale and contract of resale both called for actual measurements, and the error was oversight, caused by the unusual aspects of computing on the basis of actual measurement. The Court reversed the judgment for the plaintiff, ruling that the price was sufficiently in variance with the correct quotation to constitute notice to the plaintiff that there was error, and holding that where a mistake is so obvious, the other party must know this, or where the surrounding circumstances are such as to give notice, or where there is actual notice that an offer is made under misapprehension of a material fact, no contract will lie. It is submitted that this is a sound and practical application of the basic contract principle which prevents formulation of a valid and binding contract where one part snaps up an offer that is obviously made in error. See, *Lange v. United States* (CCA 1941), 120 F. 2d 886.

III

The United States is entitled to a decree declaring the rights and duties of the appellee and the Government under and by virtue of any agreement arising under transactions between the appellee and the appellant's agent or agents.

Title 28, United States Code, (1941, Section 400) provides:

“(1) In cases of actual controversy (except with respect to Federal taxes) the Courts of the United States shall have power upon petition, declaration, complaint or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.”

Remedy of the Declaratory Judgments Act is properly used where a public authority seeks a declaration that the contract entered into by it was void or voidable. Borchard *Declaratory Judgments*, (2d Edition, 1941) 1004. In this instance the United States seeks to have set aside or rescinded a contract sale purportedly entered into between agents of the War Assets Administration and appellee Jones. The requirement of the existence of a case or controversy in suits in a federal court under the Declaratory Judgments Act is whether the facts alleged show that there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Maryland Casualty Co. v. Pacific Coal & Oil Company, et al.* 312 U. S. 270, 273.

“The Congress having conferred upon Federal Court’s power to grant declaratory relief in an appropriate case, the right to it is not lightly to be denied. * * * The remedy of a declaratory judgment will be refused, granting the Court has discretion to decline it,

only if it will not finally settle the rights of the parties. *Aetna Casualty Insurance Co. v. Quarles*, 4 Cir., 92, F. 2d 321." *Maryland Casaulty Co. v. Faulkner et al.* (CCA 6, 1942), 126 F 2d 175, 178.

The District Court in its Findings of Fact and Conclusions of Law made no statement of why declaratory relief was refused in this case. (R. 33-38.) The Conclusions of Law simply stated, "Plaintiff is not entitled to rescind said sale or to the other relief prayed for by plaintiff herein and the action shall be dismissed for want of equity." (R. 37.) Declaratory relief was prayed for in the amended complaint (R. 27) and also in the pre-trial order. App. *infra*, pp.....

IV

The District Court erred in dismissing the action for want of equity.

A. The ground assigned by the District Court for the decision "difficulties attendant" upon rescission of an entire sale of personal property where partial delivery has been made, is untenable.

The fact that partial performance was made by the Government would appear material only insofar as it may afford

the defendant defense that the parties cannot be equitably restored to the status quo, or the defense of ratification.

Assuming that the first of these defenses is applicable to the United States, there was nothing in the circumstances indicating that substantial restoration could not be effected by the decree directing the defendant to return the goods delivered to him on the appellant's tender of the purchase price. The burden of proving such a change in circumstances as would cause him loss, or render it inequitable to require him to make restoration was on the appellee. Restatement of Restitution, Section 142, Comment G. No such circumstances were proved by the defendant.

Further, a change in circumstances would appear to be no defense in a suit of the United States for setting aside the sale as void on the facts presented. Since the defendant acquired the goods as the result of unauthorized acts of Government agents, the goods remained the property of the United States.

The Court found that the plaintiff continued to deliver goods to the defendant after delivery of the gear joints was refused. Neither this fact nor the failure of the Government to make prompt tender of the entire purchase price was a ratification of the sale. The agents representing the Government had no authority to accept or retain the purchase

price or to make any deliveries to the defendant, and their doing so does not bind the Government. (Cf. *Wisconsin Central Railroad v. United States*, 164 U. S. 190, 210, 212.

If the Government established grounds for rescission are setting aside the sale the contingencies that defendant had disposed of any of the goods could have been met by a decree providing that if he was unable to return any of them the amount of the plaintiff's tender should be reduced by this value; and the Court could retained jurisdiction for the purpose of ascertaining such value. *Warner v. Daniel*, 1 Woodbury and N. 90 (CCMASS.) The government consented in the pre-trial order to a decree charging the defendant with the apportioned contract price of any goods he was unable to return. The apportioned price of the goods delivered to him totaled \$5.87 (R.)

B. Tender before suit for rescission or asking that contract be set aside is not necessary.

"However, as a general rule an actual tender is not essential to equitable relief where the party offers to do equity in his bill." 30 CJS, Equity, Section 91.

Since a court of equity can impose restitution as a conditioned precedent to its relief, there is no necessity for a preliminary offer to restore what the plaintiff has received. 5 Williston on Contracts (Rev. Ed.) Section 1460 and 1460A. The right of a person to restitution for a benefit

conferred upon another in a transaction which is voidable for fraud or mistake is not dependent upon his return or offer to return to the other party anything which he received as a part of the transaction. Where such thing consists of money which can be credited, restitution is granted. (Restatement of Restitution, Section 65.) The plaintiff asked in the pre-trial order that the defendant be reimbursed for the sum of \$75.00, \$69.13 of which was previously tendered and that all items delivered to the defendant by plaintiff be restored to plaintiff, or in the alternative, if the defendant is put to a hardship to restore the parties to status quo by a re-delivery to plaintiff of all the items delivered to the defendant, but if the defendant so elects to retain all items delivered, then he should be reimbursed in the sum of \$69.13, the amount paid by him for the said universal gear joints. (App. *infra*. pp.). It is clear from the case that tender of less than the amount of \$75.00 did not prejudice the appellee in any manner and in fact tender of the full amount would have been futile.

C. Acts of agents of Government in moving universal gear joints from the State of Oregon into the State of Washington will not bar the relief prayed for by the Government.

The Court sets out in its findings of fact (R. 36) that the goods were moved by the Government agents into the State of Washington after a replevin action had been filed against the Director of the War Assets Administration, in

the Oregon State Court. It is a general rule that the United States is not bound or estopped by acts of its agents, which the law does not sanction or permit. (*Utah Power & Light Co. v. United States*, 243 U. S. 389, 408; 54 Am. Jur. U. S., Section 124).

There was no evidence introduced in the case that these gear joints were removed from the State of Oregon into the State of Washington or the circumstances concerning the case in the state court, except that the pleadings in the Circuit Court of the State of Oregon were offered in evidence and objected to by the Government. (R. 178.)

V. Findings of Fact and Conclusions of Law do not resolve issues raised by the pleadings and pre-trial order nor show the basis for the decision; and the Findings of Fact do not support the Conclusions of Law.

Rule 25 of the Federal Rules of Civil Procedure requiring the trial court to find facts specially and state separately in conclusions of law is mandatory. *Application of Murra*, 166 F. 2d 605; *Hill v. Ohio Casualty Insurance Company*, 104 F. 2d 695. To comply with the rule it is important that:

“* * * the trial judge make brief, pertinent findings in respect to contested matters and file the same in connection with his opinion.” *Matton Oil Transfer Company v. The Dynamic, et al.*, 123 F. 2d 999, 1001; *United States v. Forness*, 125 F. 2d 928, 942.

“To be sure, the primary and basic test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues in the case so as to provide the basis for purposes of decision. *Schilling v. Schwitzer-Cummins Co.*, 142 F. 2d 82.” *Shapiro v. Rubens*, 166 F. 2d 659, 665.

The Findings of Fact and Conclusions of Law do not resolve the issues which were raised in the pre-trial order and the pleadings and tried. The issues raised are set out in the pre-trial order. (Appendix, *infra.*, pp.....)

A. The Conclusions of Law do not set out that there was a valid sale arising out of the transactions between Appellee Jones and agents and employees of the War Assets Administration.

The statement “plaintiff is not entitled to rescind *said sale*” might infer that the Court concluded there was a valid sale, but it is not clear from the Findings of Fact and Conclusions of Law whether the Court had determined that there was a valid sale. The issue of the validity of the sale was not resolved by the Court.

B. The Conclusion that the declaratory relief prayed for should be denied is not supported by findings of fact.

There are no statements in the findings of fact which would be the basis for the conclusion that the relief prayed for in asking a declaratory decree of the rights and duties of the parties under a transaction arising out of the negotia-

tion between the appellee and agents of the War Assets Administration should be denied. The argument that the District Court should have granted declaratory relief is set out above.

VI

The findings of fact are clearly erroneous.

A. Paragraph I of the findings of fact stated:

“Said War Assets Administration then issued directions that this residue be placed on sale at the best price offered.”

There is no evidence that anyone having authority to sell the universal gear joints placed them on sale for the best price offered. On the contrary it was shown by the testimony of C. T. Mudge, Regional Director, that he was the only one authorized to make a negotiated sale. (R. 163.) Clerk Typist Webb's testimony was that Mr. Williams, Head of the Awards Committee, had authorized this residue which included the universal gear joints to be sold for the best price obtainable, (R. 73, 215) but from the uncontradicted testimony Mr. Williams had no authority to make a negotiated sale nor to authorize anyone to make such a sale.

B. Paragraph I of the findings of fact stated:

"A reasonable test of the market had been made by plaintiff before said goods were sold to defendant."

This finding is clearly erroneous. These universal gear joints were offered for sale only once on the Special Offering C-286 (plaintiff's Exhibit No. 1). Acting Chief of the Automotive and Machinery Division, Burgoyne, testified that had it come to his attention that these universal gear joints were marine equipment, that they might have found some other way to advertise it, or advertise it in another offering. (R. 88.) It should be noted that the bids received on Offering C-286 (plaintiff's Exhibit No. 1) were not opened until 2 p.m., October 24, 1946, and that the sale to Appellee Jones was made on October 30, 1946 (R. 132). Assistant Deputy Regional Director Zanon testified that it would have not been necessary to sell the goods for less than scrap value. (R. 119.) In any event the finding that there was a reasonable test of the market of the goods was not material since the sale was unauthorized.

C. Finding of the Court that there was no substantial evidence to establish the value of the universal gear joints at the time of the sale and that the exact value of the goods was questionable and speculative was clearly erroneous.

Zanon testified that the gear joints contained a high percentage of brass or bronze and that the scrap value at the

time of the sale was \$2260.00. (R. 109, 118.) Appellee Jones testified that he did not know the exact value of the goods at the time of the sale but he did know the approximate weight of the gears and the approximate worth of bronze and that the gears contained a high percentage of bronze. (R. 129, 130.) Appellee Jones set out in his complaint in the state court replevin action that the value of the gear joints was \$31,000.00. He stated that value was determined from a catalog he had received from an Eastern firm advertising similar universal gear joints. (R. 153.)

The value of the gear joints was over \$2200.00 at the time of the sale, if the goods were sold as scrap, and the value, sold as gear joints would be considerably more than scrap value. There was no contradictory evidence of the fact of this value.

D. The findings of fact, paragraph III, that the Government's agents made no mistake concerning the identity, nature or value of said universal gear joints was clearly erroneous.

Webb and Burgoyne testified that they had never seen the gear joints and were unfamiliar with marine equipment of this type. That they thought the gear joints were automotive equipment since they had been referred to the automotive division. (R. 68, 69, 86.) The fact that the scrap value alone was over \$2,000 is indicative of a mistake by

those agents of the War Assets Administration negotiating with Appellee Jones and selling the universal gear joints with the other residue for \$75.00.

D. The finding that the appellee did not have reason to know that plaintiff or its agents lacked authority to make said sale is clearly erroneous. (R. 35.) The testimony which was uncontradicted showed that no one dealing with appellee had authority to make the sale on the basis the universal gear joints were sold. (R. 158, 114-116, 124, 163.) It is settled law that all persons are charged with notice of limitation of Governmental agents' authority. (*Utah Power & Light Company v. United States*, 243 U. S. 389.)

CONCLUSION

For the foregoing reasons we respectfully submit that the lower court erred and this case should be reversed.

HENRY L. HESS,
United States Attorney
for the District of Oregon.

VICTOR E HARR,
GENE B. CONKLIN,
Assistant United States Attorneys.

APPENDIX

The pertinent provisions of the Surplus Property Act of October 3, 1944, 58 Stat. 765, as amended, 50 U. S. C. App., Supp. V, Secs. 1611-1646, are as follows:

SEC. 2. [50 U. S. C. App. Supp. V, sec. 1611.]

(h) To assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;

(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home and abroad with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping;

(q) to prevent insofar as possible unusual and excessive profits being made out of surplus property;

(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.

* * * * *

SEC. 3. [50 U. S. C. App. Supp. V, sec. 1612.] As used in this Act—(a) The term "Government agency" means any executive department, board, bureau, commission, or other agency in the executive branch of the Federal Government, or any corporation wholly owned (either directly or through one or more corporations) by the United States.

(c) The term "disposal agency" means any Government agency designated under section 10 to dispose of one or more classes of surplus property.

(d) The term "property" means any interest, owned by the United States or any Government agency, in real or personal property, of any kind, wherever located, but does not include * * *

(e) The term "surplus property" means any property which has been determined to be surplus to the needs and responsibilities of the owning agency in accordance with section 11.

* * * * *

(g) The term "care and handling" includes completing, repairing, converting, rehabilitating, operating, maintaining, preserving, protecting, insuring, storing, packing, handling, and transporting, and, in the case of property which is dangerous to public health or safety, destroying, or rendering innocuous, such property.

* * * * *

SEC. 4. [50 U. S. C. App. Supp. V, sec. 1613.] Surplus property shall be disposed of to such extent, at such times, in such areas, by such agencies, at such prices, upon such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.

* * * * *

SEC. 5. (a) [50 U. S. C. App. Supp. V, sec. 1614 (a).] There is hereby established in the Office of War Mobilization, and in its successor, a Surplus Property Board (hereinafter called the "Board"), which shall be composed of three members, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$12,000 per annum. * * *

* * * * *

SEC. 6. [50 U. S. C. App. Supp. V, sec. 1615.] The activities of the Board shall be coordinated with the programs of the armed forces of the United States in the interests of the war effort. Until peace is concluded the needs of the armed forces are hereby declared and shall remain paramount. The Board shall have general supervision and direction, as provided in this Act, over (1) the care and handling and disposition of surplus property, and (2) the transfer of surplus property between Government agencies.

* * * * *

SEC. 9. (a) [50 U. S. C. App. Supp. V, sec. 1618.] The Board shall prescribe regulations to effectuate the provisions of this Act. In formulating such regulations, the Board shall be guided by the objectives of this Act.

* * * * *

SEC. 10. (a) [50 U. S. C. App. Supp. V, sec. 1619 (a).] Except as provided in subsection (b) of this section, the Board shall designate one or more Government agencies to act as disposal agencies under this Act. In exercising its authority to designate disposal agencies, the Board shall assign surplus property for disposal by the fewest number of Government agencies practicable and, so far as it deems feasible, shall centralize in one disposal agency responsibility for the disposal of all property of the same type or class.

* * * * *

SEC. 11. (a) [50 U. S. C. App. Supp. V, sec. 1620.] Each owing agency shall have the duty and responsibility continuously to survey the property in its control and to determine which of such property is surplus to its needs and responsibilities.

(b) Each owning agency shall promptly report to the Board and the appropriate disposal agency all surplus property in its control which the owning agency does not dispose of under section 14.

(c) Whenever in the course of the performance of its duties under this Act, the Board has reason to believe that any owning agency has property in its control which is surplus to its needs and responsibilities and which it has not reported as such, the Board shall promptly report that fact to the Senate and House of Representatives. Each owning agency and each disposal agency shall submit to the Board (1) such information and reports with respect to surplus property in the control of the agency, in such form, and at such reasonable times, as the Board may direct; (2) such information and reports with respect to other property in the control of the agency, to such extent, and in such form, as the Board may direct and as the agency deems consistent with national security.

(d) When any surplus property is reported to any disposal agency under subsection (b) of this section, the disposal agency shall have responsibility and authority for the disposition of such property, and for the care and handling of such property pending its disposition, in accordance with regulations prescribed by the Board. Where the disposal agency is not prepared at the time of its designation under this Act to undertake the care and handling of such surplus property the Board may postpone the responsibility of the agency to assume its duty for care and handling for such period as the Board deems necessary to permit the preparation of the agency therefor.

(e) The Board shall prescribe regulations neces-

sary to provide, so far as practicable, for uniform and wide public notice concerning surplus property available for sale, and for uniform and adequate time intervals between notice and sale so that all interested purchasers may have a fair opportunity to buy.

* * * * *

SEC. 15. (a) [50 U. S. C. App. Supp. V, sec. 1624.] Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper: * * *

(b) Any owning agency or disposal agency may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board.

* * * * *

SEC. 25. [50 U. S. C. App. Supp. V, sec. 1634.] A deed, bill of sale, lease, or other instrument executed by or on behalf of any Government agency purporting to transfer title or any other interest in property under this Act shall be conclusive evidence of compliance with the provisions of this Act insofar as title or other interest of any bona fide purchasers for value, or lessees, as the case may be, is concerned.

* * * * *

The pertinent provisions of the Act of September 18, 1945, 59 Stat. 533, c. 368, secs. 1-2, 50 U. S. C. App. Supp. V, sec. 1614a-1614b are as follows:

SEC. 1. There is hereby established in the Office of War Mobilization and Reconversion a Surplus Property Administration which shall be headed by a Surplus Property Administrator. The Administrator shall be appointed by the President by and with the advice and consent of the Senate and shall receive compensation at the rate of \$12,000 per year. The term of office of the Administrator shall be two years.

SEC. 2. (a) Effective at the time the Surplus Property Administrator first appointed under this Act qualifies and takes office, the Surplus Property Board created by section 5 of the Surplus Property Act of 1944 is abolished, all of its functions are transferred to, and shall be exercised by, the Surplus Property Administrator, and all of its personnel (except the members thereof), records, and property (including office equipment) are transferred to, and shall become, respectively, the personnel, records, and property of the Surplus Property Administration.

* * * * *

(c) All regulations, policies, determinations, authorizations, requirements, designations, and other actions of the Surplus Property Board, made, prescribed, or performed before the transfer of functions provided by subsection (a) of this section shall, except to the extent rescinded, modified, superseded, or made inapplicable by the Surplus Property Administrator, have the same effect as if such transfer had not been made; but functions vested in the Surplus Prop-

erty Board by any such regulation, policy, determination, authorization, requirement, designation, or other action shall, insofar as they are to be exercised after the transfer, be considered as vested in the Surplus Property Administrator.

* * * * *

The pertinent provisions of Executive Order No. 9689, 11 Fed. Reg. 1265 (1946) are as follows:

CONSOLIDATION OF SURPLUS PROPERTY FUNCTIONS

Whereas the Surplus Property Administration has now substantially completed the performance of its policy-making functions, the War Assets Corporation is now vested with the major part of domestic surplus property disposal, and the State Department is now vested with the major part of foreign surplus property disposal; and

Whereas, after a reasonable period in which to make necessary administrative arrangements, it will be feasible and desirable to establish a War Assets Administration as a separate agency directly responsible to the President to exercise consolidated functions relating to the disposal of domestic surplus property;

Now therefore, by virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941 (55 Stat. 838), and as President of the United States, it is hereby ordered as follows:

1. The functions of the Surplus Property Administrator and of the Surplus Property Administration are

hereby transferred, except as otherwise provided herein, to the chairman of the board of directors of the War Assets Corporation, and to the War Assets Corporation, respectively, and the Surplus Property Administration shall be deemed merged into and consolidated with the War Assets Corporation.

2. All functions of the Surplus Property Administrator and the Surplus Property Administration which relate to surplus property located outside the continental United States, Hawaii, Alaska (including the Aleutian Islands), Puerto Rico, and the Virgin Islands are transferred to the Secretary of State and the Department of State, respectively.

3. Effective March 25, 1946 (a) there shall be established, in the Office for Emergency Management of the Executive Office of the President, a War Assets Administration at the head of which there shall be a War Assets Administrator, who shall be appointed by the President by and with the advice and consent of the Senate, and who shall receive a salary at the rate of \$12,000 per annum unless the Congress shall otherwise provide, and (b) the functions of the War Assets Corporation relative to surplus property and of the Chairman of the board of directors of the War Assets Corporation relative to surplus property shall be transferred to the War Assets Administrator.

4. There shall be transferred to the agencies to which functions are transferred by this order so much as the Director of the Bureau of the Budget shall determine to relate primarily to such functions, respectively, of the records, administrative property, personnel, and funds of the Surplus Property Administration, the Office of War Mobilization and Reconversion,

the Reconstruction Finance Corporation, and the War Assets Corporation. All authorization, commitments, or other obligations incurred as a disposal agency by the Reconstruction Finance Corporation or by the War Assets Corporation under the Surplus Property Act of 1944 shall be transferred to the War Assets Administration upon its establishment.

* * * * *

[Title of District Court and Cause]

PRE-TRIAL ORDER

Pre-trial conference having been duly held on the..... day of December, 1947 before the Honorable Claude McCulloch, judge of the above-entitled court, plaintiff appearing by Victor E. Harr, Assistant United States Attorney, and defendant appearing in person and by one of his attorneys, Thomas H. Tongue III; the following proceedings were had, to-wit:

AGREED FACTS:

The following admissions were made by the parties through their respective counsel:

1. This is a civil action brought by the United States and this Court has jurisdiction under 28 U.S.C., Section 41.
2. That during all times hereinafter named, the United States Maritime Commission was and at all times has been an Agency of the United States of America, and during all times hereinafter named, the War Assets Administration

is an Agency of the United States of America, duly established under Public Law 457 of the 78th Congress, entitled "Surplus Property Act of 1944", and that the War Assets Administration as a disposal agent was provided for in Executive Order 9689, issued by the President on January 31, 1946, and published in Federal Register.

3. That heretofore and on or between May 29, 1946 and June 22, 1946, all as shown by plaintiff's Exhibit No. 2, certain Universal Gear Joints, described as Lots No. 27, 28, 29 and 30 in plaintiff's Pre-Trial Exhibit No. 1, were, by the owning Agency, United States Maritime Commission, duly and legally declared surplus property to the War Assets Administration, which said War Assets Administration undertook to dispose of said surplus property in accordance with the aforesaid Act of Congress and the regulations and orders promulgated thereunder. That various other items were likewise declared surplus property for disposal by said War Assets Administration and, as hereinafter stated, were offered for sale by the same special offering as said Universal Gear Joints.

4. That said Universal Gear Joints, together with the other aforesaid items, were listed by said War Assets Administration for disposition by the Automotive and Machinery Sales Division of said Administration and that at that time, said War Assets Administration was in possession

of a full and complete description of said joints and of said other items.

5. It was the practice of the War Assets Administration to cause to be issued and circulated "Special Offerings" to interested parties. In the instant case, the Advertising Section of the War Assets Administration circulated a special offering, designated herein as plaintiff's Pre-Trial Exhibit No. 1, to persons engaged in the automotive trade, to persons engaged in dealing with hardware, machinery, farm implements and in the purchase of metals for scrap, and to interested veterans who had placed their names of record; and that said Special Offering C-286 listed and described all surplus equipment, machinery and accessories therein advertised, and invited bids thereon.

6. That the said Universal Gear Joints, together with other equipment and parts, including both certain automotive equipment and parts and certain non-automotive machinery and parts, were thus listed in "Special Offering C-286", which was issued and circulated as aforesaid and in which said special offering the aforesaid gears were fully and completely described and were shown to be located at the shipyard of the Oregon Shipbuilding Corporation, but that no bids were received thereon from the persons to whom said special offering was issued and circulated. That the mailing card showing the classes of per-

sons to whom said special offering was sent is attached hereto as defendant's Exhibit Pre-Trial Exhibit No. 9.

7. That after various items thus offered in said Pre-Trial Exhibit No. 1 were disposed of there remained a residue of unsold items, to-wit, the items described in Lots Nos. 1, 2, 3, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32.

8. That thereafter, and on or about the 30th day of October, 1946, defendant herein made an inquiry of a salesman of the War Assets Administration as to whether or not there were any Jeep Motors for sale at said time by the War Assets Administration. The said salesman, referring to the aforesaid residue, informed defendant that there were available two Jeep Motors, but that to acquire same it would be necessary to purchase all of the items comprising the unsold residue of the aforesaid Pre-Trial Exhibit No. 1. That at that time both defendant and said representative of the War Assets Administration had in their possession the description of said goods as described in said special offering. After considerable discussion, defendant advised the said salesman that he would consider buying the unsold residue as aforesaid, if priced low enough; the said salesman then offered to sell all of said residual items to defendant for \$75. That defendant agreed to buy said items at said price, and later paid said sum by check to the Cashier of War Assets Administration; that a Sales Memorandum, Form WAA-2a, designated herein

as plaintiff's Pre-Trial Exhibit 3, was later issued covering said purported sale and that thereupon, said War Assets Administration mailed to plaintiff [sic] a receipt for said check, designated herein as defendant's Pre-Trial Exhibit No. 10, and thereafter mailed to plaintiff a certain sales document, being Form WAA-1a, which contained certain conditions of sale stated thereon, all stated in defendant's Pre-Trial Exhibit No. 11; that thereafter defendant was allowed and permitted to take delivery of all of said items, except Lots Nos. 27, 28, 29 and 30, being the said Universal Gear Joints. That before delivery of said gears was made to defendant, and on or about November 12, 1946, the War Assets Administration and U. S. Maritime Commission refused delivery thereof to defendant.

9. That at or about the time of the filing of the complaint herein on September 26, 1947, plaintiff tendered to defendant the sum of \$69.13, being that portion of the sale price for said alleged sale allotted to said Universal Gear Joints. That said tender was rejected by defendant and plaintiff has paid said sum into the registry of this court for defendant's use and benefit; that plaintiff has at all times retained the proceeds from the purported sale of the following delivered items purportedly sold to defendant at the time and under the circumstances hereinabove set forth:

one dump truck body (item 1), 12 brass plug coils

(item 2), 2 jeep motors (item 3), 104 King pins for trailer hitches (item 23), 3 Norgren lubricators (item 24), 3 spare parts for circulating pumps (item 25), 240 miter gears (item 26), and two chess wagons (items 31 and 32).

PLAINTIFF'S CONTENTIONS

1. That through inadvertence and mistake, the coding section of the War Assets Administration assumed that said Universal Gear Joints were automotive equipment and parts, and they were accordingly listed for disposition with the Automotive and Machinery Division of the War Assets Administration, whereas, in truth and in fact, said equipment was designed by the manufacturer thereof as Industrial Machinery, and it was so used generally and was unsuited for and incapable of being used as automotive Universal Gears or for any other automotive purpose.

2. That because the same were not automotive parts or equipment, readily known by men with automotive knowledge and experience by reading the technical description thereof in the said special offering, no bids were received from veterans or from men engaged in the automotive business and trade.

3. That the parties to the aforesaid transaction were mutually mistaken as to the nature and value of the Universal Gears, and there was an utter failure of meeting of minds in that neither plaintiff's agent nor defendant, at

said time and place were familiar with the items then offered for sale and particularly were not familiar with the said gears; that they had never seen the said gears, were unfamiliar with the value thereof in that they both believed the gears were of insignificant value; that both were of the mistaken opinion that the gears were automotive parts, whereas, in truth and in fact, the said gears were Industrial Machinery and were unsuited for and incapable of being used in automobiles; and further, that said gears in fact at said time had a retail price and declared value of \$62,533.45 and that plaintiff theretofore had paid the said sum of said gears, and that at the time of the aforesaid sale the gears had a scrap value of \$2,260.00.

4. That because of aforesaid, plaintiff alleges that there was a total failure of meeting of minds; both plaintiff and defendant were mutually mistaken as to an essential fact, to-wit: the nature and value of said articles; and further to permit said sale to be consummated would result in gross inequity and hardship.

5. That the United States Maritime Commission, upon becoming aware of the purported inequitable sale, withdrew said gears from the War Assets Administration.

6. If it is contended by defendant that he was fully familiar with the nature, use and value of the residual items of the special offering herein and particularly of the said Universal Gear Joints, then, in that event, plaintiff contends

that defendant also knew that plaintiff's agent was ignorant of the nature, use and value thereof, as is more particularly set forth in preceding paragraphs of plaintiff's contentions herein, and with said knowledge defendant knew that the price quoted by said agent was grossly unfair and inadequate in comparison to the true and actual value of said items and that notwithstanding said knowledge by defendant and the known lack of knowledge of plaintiff's agent, defendant, by his acts, words and disarming conduct, misled plaintiff's agent to the loss and hardship to plaintiff and to his own inequitable and unconscionable gain.

7. It is further contended that plaintiff's sales representative making the purported sale exceeded his authority in that his delegated authority to execute contracts was to execute individual sales contracts not to exceed a declared value of \$50,000. (War Assets Daily Bulletin No. A80, 9-23-1946, on Page 4, designated herein as Plaintiff's Pre-Trial Exhibit No. 5) and thereby said sale was void ab initio.

8. It is further contended that plaintiff's agent exceeded his authority in that the purported sale did not comply and was repugnant to the objectives of Public Law 457 of the 78th Congress, entitled "Surplus Property Act of 1944".

9. It is further contended that plaintiff did not authorize, approve or ratify said purported sale and that

plaintiff was not negligent in any respect that would preclude rescission of the contract herein.

10. It is further contended that by motion in the Multnomah County Circuit Court Case No. 174225, by defendants Mudge and Gibson therein, it was asserted that authority was lacking for the sale of the said gears.

11. It is further contended that defendant is charged with knowledge of the lack of authority of plaintiff's agent to consummate said purported sale.

12. It is contended by defendant and plaintiff admits that said gears were moved subsequent to institution of legal proceedings instituted in the Circuit Court by defendant herein against defendants Mudge and Gibson, but contends that said suit was against individuals and not binding upon plaintiff herein, as the United States had not consented therein to be sued, and further that defendant was not prejudiced by the moving of said gears as the said State court action was based on replevin and sought, as an alternative for the recovery of possession of the said property, a specified sum of money.

13. Plaintiff contends it took appropriate steps to notify defendant of its intention to rescind the alleged sale and to restore the defendant to status quo, and refers specifically to defendant's pre-trial Exhibit No. 18.

14. Plaintiff contends that any new matter raised in

plaintiff's amended complaint was not without previous knowledge to defendant and has not prejudiced defendant in the premises.

15. Plaintiff prays:

(1) That a decree be rendered in declaration of the rights and duties of the parties hereto under and by virtue of any agreement arising under the aforementioned transaction between plaintiff's agent, or agents, and defendant.

(2) That a decree be rendered declaring the purported sale to be void and plaintiff to be the owner of the aforementioned property purported to have been sold to the defendant.

(3) That a decree be rendered to vacate, set aside and rescind the aforementioned purported sale.

(4) That defendant be reimbursed in the sum of \$75.00, \$69.13 of which was heretofore tendered to defendant and by him rejected and then tendered into the Registry of the Court for defendant's use and benefit, and that all items delivered to defendant by plaintiff be restored to plaintiff: or, in the alternative, if defendant is put to a hardship to restore the parties to status quo by a re-delivery to plaintiff of the items delivered to him, then, if defendant so elects to retain all items delivered, defendant should be reimbursed in the sum of \$69.13, the amount paid by him for the said Universal Gear Joints.

16. Plaintiff denies that said sale was at a price in accordance with a custom and practice established by plaintiff in similar sales and denies further that plaintiff established a custom of disposing of surplus war commodities at a fraction of their original cost when unsuccessful over a period of time in selling goods at a more substantial price, but to the contrary plaintiff contends it was the practice of War Assets Administration to comply with the requirement of the "Surplus Property Act of 1944".

DEFENDANT'S CONTENTIONS

1. In answer to plaintiff's contentions 1 and 2 defendant contends that both of plaintiff's said contentions are wholly immaterial to the issues herein and defendant further denies both of said contentions.

2. In answer to plaintiff's contentions 3 and 4 defendant denies the same and contends that both defendant and plaintiff's representative were familiar with the nature, use and value of said Universal Gear Joints; that said sale was at a price in accordance with custom and practice established by plaintiff in similar sales; that defendant was a bona fide purchaser for value; that with full knowledge of all of the facts as to the nature, use and value of said goods and of the price at which said goods were offered for sale to defendant, the War Assets Administration authorized, approved and ratified said sale; and that if any mistake was

made by plaintiff's representatives, which defendant denies, any such mistake was solely the result of their own negligence and not otherwise.

3. In answer to plaintiff's contention 5, defendant denies the same and denies that the United States Maritime Commission had power to withdraw said goods after said sale had been consummated.

4. In answer to plaintiff's contention 6, defendant denies the same and contends that plaintiff's representatives were fully aware of the nature, use and value of said Universal Gear Joints; that said sale was at a price in accordance with custom and practice established by plaintiff in similar sales; that defendant was a bona fide purchaser for value; that with full knowledge of all of the facts as to the nature, use and value of said goods and of the price at which said goods were offered for sale to defendant, the War Assets Administration authorized, approved and ratified said sale; and that if any mistake was made by plaintiff's representatives, which defendant denies, any such mistake was solely the result of their own negligence and not otherwise; that at the time of refusing delivery of said goods plaintiff's representatives made no claim that defendant had made misrepresentations of any kind or was in other than complete good faith; that no such claim was made by plaintiff at any time until less than three weeks before the trial of

said cause and that plaintiff is therefore estopped from alleging such grounds for rescission of said sale.

5. In answer to plaintiff's contentions 7, 8, 9, 10 and 11, defendant denies the same except for plaintiff's contention 10 and contends that defendant was a bona fide purchaser for value; that said sale was at a price in accordance with custom and practice established by plaintiff in similar sales; that with full knowledge of all of the facts as to the nature, use and value of said goods, of the price at which said goods were offered for sale to defendant, and of any and all grounds on which plaintiff now contends that said sale is void, the War Assets Administration authorized, approved and ratified said sale; that at the time of refusing delivery of said goods and at the time plaintiff's complaint was filed herein, plaintiff made no claim that the sale of said gear joints was void for lack of authority; that no such contention was made in this case until less than three weeks before the trial of said cause and that plaintiff is therefore barred and estopped from alleging such grounds for rescission of said sale; that at no time until four days before trial did plaintiff make any claim that said sale was void as to any items other than said gear joints and that plaintiff is therefore barred and estopped from attempting to rescind said sale as to any items other than said gear joints.

6. In answer to plaintiff's contention 12, defendant

denies the same, except that defendant contends, as hereinafter stated, that the removal of said goods by plaintiff's agents was with an intent to defeat the jurisdiction of the state court over said goods; that defendant was prejudiced by reason of the fact that in an action for replevin a plaintiff is entitled to the return of the goods themselves and is not obliged to accept damages in lieu thereof unless it is impossible for said goods to be returned.

7. In answer to plaintiff's contention 13, defendant denies the same and contends that there has never been any attempt by plaintiff's representatives to rescind said sale for any items other than said Universal Gear Joints; that the only grounds originally stated by plaintiff's representatives for the rescission of the sale of said gear joints was that said goods had by mistake been classified as automotive equipment and that said joints had subsequently been withdrawn by the United States Maritime Commission; that plaintiff is estopped from rescinding said sale as to any other items or on any other grounds.

8. In answer to plaintiff's contention 14, defendant denies the same.

9. In further answer to plaintiff's contentions defendant contends that all of the facts as to the nature and value of said Universal Gear Joints were fully available to both parties at the time of said sale; that thereafter, with full knowledge of said facts, plaintiff's agents, acting with

apparent and actual authority, accepted payment by defendant, issued Sales Documents designated herein as Defendant's Pre-Trial Exhibit 11, purporting to transfer to defendant title to said joints and delivered to defendant all of the items covered by said sale other than said Universal Gear Joints; that at the time of said sale, defendant was a bona fide purchaser of said goods for a valuable consideration and without notice of any alleged mistake or lack of authority on the part of plaintiff's representatives, or of their right to rescind said sale; that upon the institution by defendant of legal proceedings to recover possession of said Universal Gear Joints, plaintiff twice moved said joints out of the state with intent to defeat the jurisdiction of the Court in which said proceedings were instituted; that plaintiff took no action to rescind said sale or to restore defendant to the status quo until the filing of the complaint herein on or about September 26, 1947, at which time plaintiff offered to return to defendant the sum of \$69.13 for said Universal Gear Joints, but has at all times and does still retain the benefit of and proceeds from the sale of all other items included in said sale of October 30, 1946, and from the sale of all other items listed in Special Offering C-286; that the War Assets Administration in the Portland area has established a custom and practice of disposing of surplus war commodities at a small fraction of their original cost price when unsuccessful over a period of time in selling goods at more substantial prices; that the sale of said Uni-

versal Gear Joints was wholly in accordance with said established custom and practice; that plaintiff has been seriously prejudiced by the long delay in withholding delivery of said joints and the attempted rescission of said sale; and that under the facts of this case plaintiff is barred and estopped from seeking to rescind said sale, either in whole or in part.

10. Defendant prays that said sale be held valid and binding in all respects; that plaintiff be declared the owner of all of the items involved in said sale and that the complaint herein be dismissed.

QUESTIONS TO BE DECIDED

1. Whether plaintiff's contentions 1 and 2 are material.
2. Whether the parties to said purported sale were mutually mistaken as alleged in plaintiff's contentions to allow plaintiff to rescind said purported sale.
3. Whether, if the Court finds there was not a mutual mistake, then was there such a unilateral mistake or was plaintiff's agent misled as alleged in plaintiff's contentions so as to entitle plaintiff to rescind said purported sale.
4. Whether the representative of the War Assets Administration making said purported sale had authority to sell said Universal Gear Joints and, if not, was said sale void *ab initio*.

5. Whether said purported sale was or could be later ratified by plaintiff.

6. Whether the United States Maritime Commission had authority to withdraw from the War Assets Administration said Universal Gear Joints after said purported sale had been consummated, and, if so, whether said withdrawal was effectively accomplished.

7. Whether, under the facts and circumstances of this case as set forth in defendant's contentions, plaintiff is barred and estopped from seeking to rescind the sale of said gear joints.

8. Whether plaintiff is barred and estopped from contending that defendant made any misrepresentations or was other than in good faith or that said sale of said gear joints was void for lack of authority, or that said sale was void for any reason as to any items other than said joints.

9. Whether the Court can properly consider the custom and practice established by plaintiff in similar sales and, if so, what was said custom and practice and was this sale in accordance therewith.

10. Whether defendant was a bona fide purchaser for value.

11. Should the rights of the parties be determined in any of the respects set forth in plaintiff's contention No. 15.

EXHIBITS

PLAINTIFF'S:

1. Special Offering No. C-286.
2. A to D, inclusive, Forms SPB1, declaration of surplus property.
3. A to I, inclusive, Forms WAA2a, sales memoranda.
4. A to I, inclusive, Forms WAAa.
5. Bulletin No. 80, dated 9/23/46, entitled "Daily W.A.A. Bulletin".
6. A to D, inclusive, Universal Gear Joints.
7. (Reserved) Form SPB 1.1, Withdrawal Form.

DEFENDANT'S:

8. (Reserved) A to, inclusive, Forms WAA2a for other items included in Special Offering No. C-286.
9. For 1121, Mailing Card.
10. Receipt.
11. A to I, inclusive, Forms WAA1a for all items sold to defendant.
12. Pleadings in Circuit Court, Multnomah County, Case No. 174225, Jones v. Mudge, et al.:
 - (a) Complaint.
 - (b) Motion to Dismiss.
 - (c) Order Denying Motion and Allowing Filing Amended Complaint.
 - (d) Motion to Make Definite and Certain.
 - (e) Order Allowing Motion to Make Definite and Certain.
 - (f) Amended Complaint.
 - (g) Answer.
13. Deposition of C. T. Mudge, D. M. Gibson and S. M. Buffett in said Case No. 174225.
14. Deposition of William J. Burgoyne herein.

15. Deposition of Delbert W. Webb and Louis A. Zannon.
16. Memorandum dated 3/13/47 to S. M. Buffett.
17. Shipping Notice dated 3/13/47.
18. Letter dated 12/4/46 from C. T. Mudge to Neal W. Bush.
19. Universal Joint, sample of automotive joint.
20. Three roller bearings.
21. (Reserved) A to, inclusive, Forms WAA-2 for goods sold between 9/1/46 and 1/1/47 to Ziddell Mach. & Supply Co., Barde Steel Co., Calif. Bag and Metal Co., and Schnitzer & Wolfe Mach. Co.
22. Pleadings in this case.

Plaintiff objects to defendant's Pre-Trial Exhibits 8, 10, 12, 16, 17, 19, 20 and 21 on the ground that the same are irrelevant and immaterial and will not aid in the proof or disproof of any of the issues involved in this case.

Defendant objects to plaintiff's Pre-Trial Exhibits 2, 3, 4, 5, and 7 on the ground that the same are irrelevant, immaterial and incompetent and not the best evidence.

CONCLUSIONS

The foregoing is the Pre-Trial Order agreed upon at a conference between counsel and the Court. It shall not be amended at the trial except by consent of counsel or to prevent manifest injustice. It supersedes the pleadings, which now have no effect in this case.

The foregoing Pre-Trial Order is hereby approved and settled.

Dated this.....day of....., 1948.

District Judge

APPROVED:

Of Attorneys for the United States

Of Attorneys for Defendant

No. 11963

**In the United States
Circuit Court of Appeals**
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	}
<i>Appellant,</i>	
vs.	
HERBERT A. JONES, JR.,	}
<i>Appellee.</i>	

Upon Appeal from the District Court of the United
States for the District of Oregon

BRIEF FOR APPELLEE

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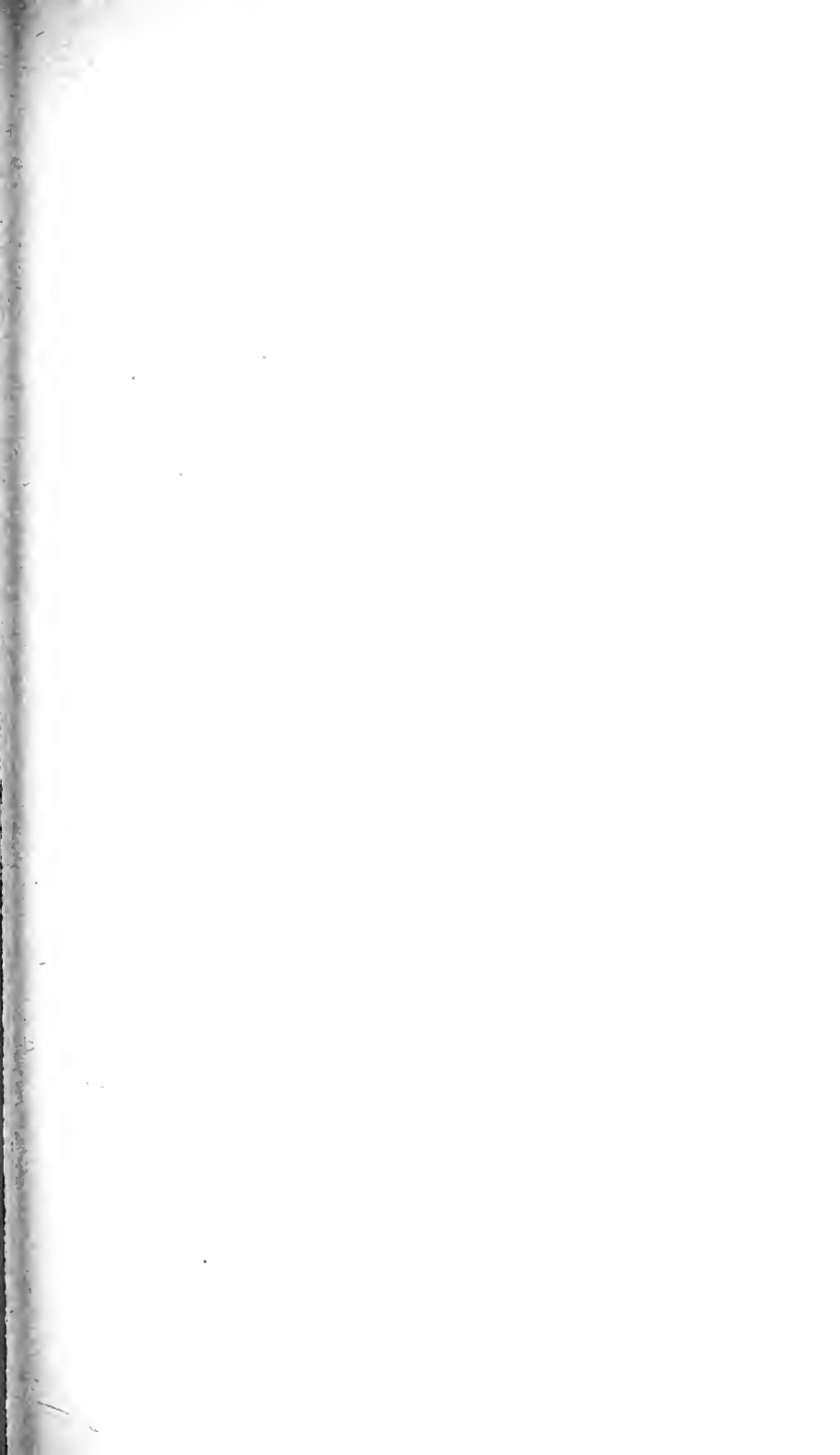
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FILED

DEC 11 1948

PAUL P. O'BRIEN, 
CLERK





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**In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,	}
<i>Appellant,</i>	
vs.	
HERBERT A. JONES, JR.,	}
<i>Appellee.</i>	

Upon Appeal from the District Court of the United
States for the District of Oregon

BRIEF FOR APPELLEE

This is a suit in equity by the United States in an attempt to set aside a sale made by the War Assets Administration on the ground of (1) mutual mistake, (2) unilateral mistake, (3) lack of authority by government agents negotiating the sale, and (4) sale at an unfair price in violation of the Surplus Property Act (Gvt. Br. 7 and R. 20-27).

As stated below, there was ample evidence to support the findings by the trial court that there was no mistake, either mutual or unilateral (R. 35), and also to support the finding that the sale was authorized and that defendant acted in good faith; that he paid value for his

purchase and that the actual value of the goods was recognized by both parties to be wholly speculative (R. 35). Thus, as pointed out below, the sale cannot be set aside on the ground of mistake. Nor can it be set aside on the ground of lack of authority or invalidity, particularly in view of the terms of section 25 of the Surplus Property Act of 1944, 50 U.S.C.A. Sec. 1634, which specifically provides that documents of title, such as were delivered to defendant, shall be *conclusive* evidence of compliance with provisions of that Act as to any bona fide purchaser for value, which defendant clearly was under the above findings. In addition, as pointed out below, there are other equitable considerations in this case which bar the Government from relief. (See Findings of Fact, R. 34-37).

STATEMENT OF THE CASE

1. *Absence of Mistake or Lack of Authority by War Assets Administration.*

The Government offered evidence that the original cost to the government of the goods involved in this case exceeded \$60,000.00 (R. 56; Plf. Ex. 2) and places great reliance on that fact in view of their subsequent sale to defendant for \$75.00 (Govt. Br. 18-19).

It is further admitted that, in accordance with customary practice, the War Assets Administration listed these goods, together with certain other goods, in a so-called special offering inviting bids, which accurately and completely described the goods and which was sent to 4723 dealers, including the dealers in hardware, heavy machinery, and *dealers in scrap metals* (i.e., junk

yards,) in the Portland area. (See Admitted Facts in Pre-trial Order, Gvt. Br. 45-46; Plf. Ex. 1; Dft. Ex. 9; see also R. 7-15, which duplicates Plf. Ex. 1, and R. 87, 96, 187.)

Although bids were received and accepted on various items in this special offering, no bids were received on other items, including the goods in controversy, even from scrap metals dealers (P. T. Order, Gvt. Br. 45-46; R. 72, 81, 96, 204). It appears from the deposition of the Government's witnesses and from their testimony at the trial that Williams, the chairman of the W. A. A. Committee on Bids and Awards and who had authority to sell goods costing up to \$100,000.00 (R. 61, 119-120), ordered that this residue be offered for sale as a single lot at the best price that could be negotiated (R. 73, 119, 215-216, 235).

It appears from the testimony of defendant Jones that this residue was first offered for sale at a price between \$900.00 and \$1000.00; that a few days later, when no offers were received, this price was lowered to \$250.00; and that on the day of the sale in question these goods were offered for sale by the War Assets Administration for \$75.00 (R. 127, 128, 131, 144, 148). Government witnesses simply "did not remember" (R. 90, 97, 199).

It is admitted that during all this time W. A. A. and its agents had complete and accurate information as to the original cost of such goods (P. T. Order, Gvt. Br. 44-45; Plf. Ex. 2 and 3; R. 92). It also appears from

evidence offered on behalf of defendant that W. A. A. was not only under directions to get the highest possible prices but also to get rid of war surplus goods as rapidly as possible (see 50 U.S.C.A. Sec. 1611(r)); that war surplus goods were often offered at bargain prices in order to move them fast (R. 166-168), and that, accordingly, it was customary, after goods had been offered for bid and no bids received, to offer such goods at a negotiated price and to accept the best price offered, even though but a small fraction of the original cost to the Government (R. 78, 89, 119, 126, 166-168; see also Dft. Ex. 13, p. 38); that sales had been made to other dealers at prices as low as one-half of one per cent of the original cost (R. 166-168); and that this was particularly true where, as here, the goods involved were made for a special purpose for the Government and would have no general use or market (Id.). In this connection, it is significant to note that the Government, although denying all such evidence of custom, failed to produce figures on original costs and sales prices of goods sold to the "Big 4" scrap dealers in the Portland area, on excuse that all such records were in Washington, D. C., or "are in the files but sealed for shipment to San Francisco" (R. 162).

It was also admitted that all possible efforts to sell these goods at a higher price had been exhausted and that there was nothing further that could have been done to secure a higher price (R. 89, 205); that the program of sale would not have been changed even if they fully realized what they were selling (R. 88, 205), and that this particular sale was fully in accord with

W. A. A. custom and practice, as established in other sales (R. 78, 89). Finally, at the trial of the case it was agreed that the issue of mistake was "out the window and that the only issues were (1) lack of authority and (2) good faith by Jones (R. 103, 105).

After the sale was made to Jones for \$75.00, the sales documents were approved by Zannon, who had authority to make sales of goods costing up to \$100,000.00 (R. 60, 203, 231, 135). Zannon attempted to claim mistake by the fact that the documents indicated that the sale was on a bid basis and had been already approved by the Committee on Awards (R. 111, 232), but there was testimony by other government employees that this reference indicated no more than that the *original* program for the sale of the goods was on a bid basis (R. 75, 80, 91); that when a residue remained after a bid sale, it was sold on a negotiated basis (R. 81-82, 91-92, 215); that this sale was in accord with usual practice (R. 78, 89), and that the sale had already been authorized by Williams, Chairman of the Committee on Awards (R. 73, 215, 235).

It is thus clear that there was substantial evidence to support the finding by the trial judge that the sale at \$75.00 was "authorized by an agent of the War Assets Administration" (R. 36), as well as the finding that there was no mistake by the Government or its agents as to the identity, nature or value of the gear joints that determined their conduct in making the sale to Jones (R. 36).

2. *Good Faith and Absence of Mistake by Defendant.*

At the time of the sale in question, according to Jones' uncontradicted testimony, he was aware of the general practice of W. A. A. of selling goods which had not been sold for higher prices at any price which would enable it to get rid of the goods, even though a small fraction of the original cost to the Government. He had heard many of the rumors which we have all heard concerning specific sales by the War Assets Administration at unbelievably low prices (R. 126; see also R. 166-168).

With this information, Jones went to see the representatives of the War Assets Administration. He was first referred to Webb, who told him that it would be necessary to buy the entire lot; that it was for sale for \$75.00, and showed him the description of each item, as included in the special offering—admittedly a complete and accurate description of the goods (R. 129, 155, 67, 221, 7-15; Plf. Ex. 1). Webb testified Jones was principally interested in jeep engines and asked what he could do with the “junk”, but admitted that the discussion of what was meant by “junk” was limited to two Chess wagons, admittedly of little present value, and that there was no discussion of the Universal gear joints (R. 68, 74, 221). He did not claim that Jones made any misrepresentations whatever, could remember nothing further of the conversation, and admitted that he had no reason to doubt Jones' good faith (R. 74, 222).

Webb then referred Jones to Burgoyne, who was in charge of the division (R. 70, 220). Jones testified that Burgoyne gave him a sales talk and told him that it was a "good buy" (R. 131); that he was told that it was a residue remaining after an offering for bids and that no bids were received, although the offering was sent to scrap metal dealers, among others (R. 129); that the residue had been on hand for some time, and that the War Assets Administration was anxious to get rid of it (R. 131); that Burgoyne also showed him the list describing the goods and told him where he might be able to sell some of the items (R. 130-131); that he was informed that the gear joints were at Oregon Shipyards and might be sold to some shipyard still operating in the East (R. 131, 152; see also corroboration by Anderson, R. 155-156, and see R. 200). Burgoyne testified that he could remember nothing of the conversation with Jones, but did not attempt to contradict Jones' version of the affair or to claim that he made any misrepresentations (R. 90, 199).

Jones, who had previously worked in a shipyard, as fully known by the government agents (R. 74), testified that he knew what Universal gear joints were (R. 129); that he did not know whether he could sell them for anything other than for scrap (R. 130); that if sold as scrap it would be necessary for each joint to be taken apart to separate the bronze from the steel (R. 153; see also testimony by Burgoyne, R. 94-95); and that since he knew that the junk dealers had made no bids (R. 129), his best estimate was that while their value might be substantial, it was wholly speculative, depend-

ing upon what he could get out of them (R. 129, 146). He also testified, without contradiction, that he did not learn of their original cost to the Government or of their weight, for purposes of scrap, until later (R. 134-135, 146, 152-153). Some government witnesses were also unable to place any definite value on these goods (Dft. Ex. 13, p. 32; see also R. 85 and Dft. Ex. 12, Answer by Government, paragraph VIII).

Acting upon the basis of this information and belief, Jones then told Burgoyne that he would take the goods at the figure of \$75.00, placed on them by W. A. A., and gave Burgoyne a check for that amount (R. 131-132). He also testified that Burgoyne then took the papers to Zannon (who had authority to make sales up to \$100,000.00 R. 60) for approval, and then told Jones that a receipt and other papers would be mailed to him (R. 132).

A few days later Jones received in the mail a receipt for his check (Dft. Ex. 10) and the sales documents (Dft. Ex. 11), which purported, among other things, to warrant that the government agents had the right to sell the goods. It should also be noted that these sales documents state clearly that all items "constitute one complete lot at total selling price of \$75.00" (Id.).

Jones testified further, without contradiction, that a few days later he started taking delivery of the goods, which were scattered at various locations, and that when he went to Oregon Shipyard on about November 12, 1946, he was given delivery of some of the goods at that location, but was told that the gear joints had been

“tied up” (R. 132-134). On the next day he returned, but the custodian, Gibson, refused to see him for about three hours and then, when Jones persisted, told him that the U. S. Maritime Commission had withdrawn the gear joints, that something was wrong with the sale and that the gear joints originally cost the Government over \$60,000.00, weighed about 24½ tons and had a scrap value of \$2,000.00, which was the first notice to Jones of their original cost and weight (R. 134-135, 146, 154; see also Plf. Ex. 13, Dep. of Gibson, pp. 36-39). Jones then went to the War Assets Administration and was referred to Zannon, who also told him that he could do nothing about the matter (R. 135-136). He then went to the U. S. District Attorney’s office, where he told his story to Mr. Victor Harr, who later tried the case against Jones (R. 137, 50). He then engaged private counsel.

By letter dated December 4, 1946, Mr. C. T. Mudge, W. A. A. Regional Director, after receiving complete information in the matter, as stated in that letter, wrote to defendant’s counsel and gave reasons for refusing delivery of the gear joints, but made no claim of bad faith by Jones (Dft. Ex. 18). Again, on deposition taken several months later, *Mudge stated that he had no reason to doubt the good faith of Jones* (see Dft. Ex. 13, p. 12; see also R. 161). No claim of bad faith was made by the U. S. District Attorney in representing Mudge in answer to the complaint for replevin filed by Jones in the State Court, although Mr. Harr, who appeared in that case, had the entire story from Jones himself (see Dft. Ex. 12). Nor was any such claim made in the

original complaint filed by the Government in this case (Dft. Ex. 23). It was not until the amended complaint of the Government, filed on December 4, 1947, less than three weeks before trial, that the Government made any charge of bad faith.

It is thus clear from the foregoing testimony both that the Government has wholly failed to sustain its burden of proving that Jones was either mistaken or was other than a bona fide purchaser for value, and, in addition, that the whole contention of bad faith was no more than an after-thought upon realizing the conclusiveness of title to war surplus property sold by the W. A. A. to bona fide purchasers, in view of the provisions of 50 U.S.C.A. Sec. 1634. It is further clear from the foregoing that there was ample evidence to support findings by the trial judge that Jones did not act under mistake and that he acted in complete good faith, without knowledge or reason to know of any mistake or lack of authority on the part of the Government (R. 35).

3. Conduct of Government after Sale—Pleadings in this Case.

After further unsuccessful attempts to secure delivery of the gear joints, Jones filed, on December 28, 1946, a suit for replevin in the State Court against C. T. Mudge, War Assets Administration Regional Director, and D. M. Gibson, Custodian at Oregon Shipyard (see Dft. Ex. 12, Complaint). Almost immediately thereafter, the gear joints were moved to the Vancouver Shipyard, out of the jurisdiction of the Oregon Court (Dft. Ex. 12, Amended Complaint, par. I, and Answer,

par. I). Upon discovery that the goods were under the custody of J. M. Buffett, a resident of Oregon, and on joining him as a party defendant, the goods were again moved to the U. S. Army Reservation at Vancouver, Washington (Dft. Ex. 13, Deposition of Buffett). Jones then secured a restraining order from the United States District Court for the Western District of Washington, to prevent further movement of the goods (R. 175).

On September 26, 1947, nearly eleven months after the sale, the Government filed in this Court a suit to rescind the sale as to the gear joints alone, alleging as the sole grounds: (1) Withdrawal by the U. S. Maritime Commission, (2) mistake by the Government in assuming that the gear joints were automotive equipment, and (3) mutual mistake as to the nature and value of the gear joints, resulting in a gross inequity (R. 2-6). Tender was made into Court of \$69.13, the portion of the total price attributable to the gear joints (Id.). Later, it was admitted that the U. S. Maritime Commission had never withdrawn the goods from sale (R. 162), and the issue of mistake was abandoned (R. 103, 105).

After filing of defendant's answer and the setting of the case for pre-trial conference, the Government, on December 4, 1947, less than three weeks before trial, filed an amended complaint adding, as further grounds for rescission: (1) That Jones made misrepresentations to W. A. A., (2) that the sale was void as beyond authority of W. A. A., and (3) that the sale was void as in violation of the Surplus Property Act, in that the price was unfair and inadequate (R. 20-27). Even then the

Government did not ask that the sale be rescinded as a whole but only as to Lots Nos. 27, 28, 29 and 30, consisting of the gear joints (R. 24, par. 10; R. 26).

It was not until preparation of the final draft of the pre-trial order, less than four days before trial, and nearly fourteen months after the sale, that the Government took any positive action to attempt the rescission of the sale as a whole, including items other than the gear joints. Even then it was conceded that the Government had "at all times retained the proceeds from the purported sale of the following delivered items purportedly sold to defendant at the time and under the circumstances hereinabove set forth: One dump truck body (item 1), 12 brass plug coils (item 2), 2 jeep motors (item 3), 104 King pins for trailer hitches (item 23), 3 Norgren lubricators (item 24), 3 spare parts for circulating pumps (item 25), 240 miter gears (item 26), and two chess wagons (items 31 and 32)" (Govt. Br. 47-48). No attempt was made by the Government to regain possession of these goods or to tender back the purchase price of such goods (R. 152). Moreover, as the Government concedes, the pre-trial order was never signed (R. 50). In fact, as counsel will admit, the trial judge refused to sign it. Thus, the pre-trial order has no force and effect, except for the admissions of fact contained therein, and the case must be considered as submitted on the issues made up by the pleadings, subject to concessions made at the time of trial (R. 103, 105).

APPELLANT'S SPECIFICATIONS OF ERROR ARE INSUFFICIENT

As this Court well knows, Rule 20, Section 2 (d) of its Rules, requires that all briefs by appellants shall contain specifications of error which "shall set out separately and particularly each error intended to be urged," and that "when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

The original brief filed by appellant herein contained no specifications of error whatever. Thereupon the Clerk of this Court notified appellant that "your brief does not contain a specification relied upon as required by Subdivision 2(d) of Rule 20", and requested that appellant "have printed inserts for placing in your brief" (see letter, Appendix "A").

Thereupon appellant printed, served and filed what purports to be a "Specification of Errors," but which clearly fails to satisfy the requirements of Rule 20, in that the purported specification neither states with "particularity" each error alleged, nor states "wherein the findings of fact and conclusions of law are alleged to be erroneous". This is at once apparent from a mere reference to the form of appellant's purported "specification of errors".

This Court has established the rule that briefs should strictly follow the requirements of Rule 20 (2) (d) with reference to specifications or assignments of error.

O'Brien, Manual of Federal Appellate Procedure (3rd Ed.) p. 211, and *Supplement No. 4*, p. 132, and cases cited therein. See also *Cyclopedia of Federal Procedure* (2nd Ed.) Vol. 12, pp. 17, 18, 19, 181, 182. In particular, see *United States v. Shingle* (C.C.A. 9th) 91 F.(2d) 85; *Gripton v. Richardson*, C.C.A. 9th 82 F. (2d) 313; *United States v. Cushman* (C.C.A. 9th) 136 F. (2d) 815, cert. den., 320 U. S. 786; *Peck v. Shell Oil Co.* (C. C.A. 9th), 142 F. (2d) 141, and *Conway v. United States* (C.C.A. 9th) 142 F. (2d) 202. See also *E. R. Squibb & Sons v. Mallinckrodt Chemical Works* (C.C.A. 8th), 69 F. (2) 685; *Butler v. United States* (C.C.A. 8th), 108 F. (2d) 27; *Cohen v. United States* (C.C.A. 8th), 142 F. (2d) 861), and *Fleming v. Munsingwear* (C.C.A. 8th), 162 F. (2d) 125.

Further reasons for the inadequacy of each particular specification are stated below in connection with answering the argument set forth in appellant's brief, but by proceeding to an argument on the merits appellee is not to be considered as having waived his objections to the purported specifications of error. Nor are such objections to be considered as waived by the filing of this brief or by the failure to file a motion to dismiss upon such grounds, since it appears from Rule 20 (7) that when appellant's brief is not in required form, such a matter is to be called to the attention of the Court by its Clerk and set down for hearing and that only when an appellant is "otherwise" in default is the matter to be raised by appellee by a motion to dismiss. See also *O'Brien, supra*, p. 206.

SUMMARY OF ARGUMENT ON MERITS

I. SALE WAS NOT VOID FOR LACK OF AUTHORITY OR BECAUSE OF INADEQUATE PRICE.

- A. Appellant's Argument Improper because Not Based on Proper Specifications of Error and Raised Too Late in Proceedings.
- B. Findings of Fact that Sale Was a Valid Sale and Was Authorized by Agent of WAA Are Conclusive and, at least, Are Not "Clearly Erroneous."
- C. Appellee Was a Bona Fide Purchaser for Value and under the Surplus Property Act his Title Is Therefore Conclusive and Can Not Be Set Aside.
 - 1. Bill of Sale to Jones Satisfied Requirements of Surplus Property Act.
 - 2. Jones was a Bona Fide Purchaser for Value under the Act.
- D. Sale Not Invalid as at an Inadequate Price.

II. NO MATERIAL MISTAKE MADE BY GOVERNMENT AGENTS.

- A. Finding of Fact Are Conclusive That No Mistake.
- B. Grounds for Rescission Insufficient under Oregon Law.
- C. Any Alleged Mistake Was Not Material.
- D. Jones Had No Knowledge or Reason to Know of Mistake.

- E. Price Was Result of Deliberate Act by WAA with Full Information as to Nature and Value of Goods.

III. DECISION PROPER WITHOUT FURTHER DECLARATORY RELIEF.

- A. Findings, Conclusions and Judgment Sufficiently Declared Rights and Duties of Parties.
- B. Granting or Denial of Declaratory Judgment is Discretionary.

IV. DISMISSAL FOR WANT OF EQUITY PROPER.

- A. Equity Will Not Partially Rescind a Non-Severable Contract.
- B. Failure of Tender and Delay in Rescission Proper Factors for Consideration.
- C. Movement of Goods outside State Also Proper Factor for Consideration.
- D. Other Factors Also Present Which Justified Denial of Relief.

V. FINDINGS AND CONCLUSIONS NOT INADEQUATE.

- A. Findings and Conclusions Furnished Sufficient Basis for Decision.
- B. Any Defects in Findings and Conclusions Not Reversible Error.

VI. FINDINGS OF FACT CONCLUSIVE AND NOT "CLEARLY ERRONEOUS."

ARGUMENT ON THE MERITS

I. SALE NOT VOID FOR LACK OF AUTHORITY OR BECAUSE OF INADEQUATE PRICE.

Appellant first argues that the sale of the Universal gear joints was void ab initio, first, because the W. A. A. agents were without authority to make the sale, and, second, because the sale was at an inadequate price (Gvt. Br. 16-19).

A. Appellant's Argument improper because not based on proper specification of error and raised too late in proceedings.

Appellant's specifications of error will be searched in vain for any specification either directly bearing on this point or giving this point as a reason in support of any specification, both as required by Rule 20. Clearly specifications 1, 2, 3, 7, 8 and 10 refer to other points argued by appellant and will be considered later (see Argument on Points III, IV and V). Specification 4 is clearly inadequate for any purpose (cf. *United States v. Cushman*, supra). Specifications 5 and 9, in referring to rescission of the sale, assume that title passed and that the sale was not void ab initio and therefore have no bearing on this point. This leaves only specification 6, which complains of the holding by the trial court that the transaction constituted a valid sale. But this specification is defective in not stating any reason why such a holding was in error, as required under Rule

20. Therefore, this point should not be considered by this Court for lack of a proper or any specification of error.

Moreover, the claim that the sale was invalid, either for lack of proper authorization or approval, or as contrary to the policy of the Surplus Property Act, was not raised in the original complaint in this case (R. 2-6) or otherwise until the filing of the amended complaint, filed over two months later, over fourteen months after the sale and less than three weeks before trial (R. 20-27). The original complaint was based solely on a theory of mistake. As held in *Railway Co. v. McCarthy*, 96 U.S. 258, 267:

“Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.”

Thus the Court held that where the illegality of a contract was not raised before, it was “an afterthought, suggested by the pressure and exigencies of the case” and could not be raised later.

Finally, appellant cannot now claim that the sale was void “ab initio” for the reason that at the time of trial, although elsewhere contending that the sale was not authorized, appellant admitted that, in view of the provisions of the Surplus Property Act, when, as here, the sales documents were executed and delivered “probably title has passed, but we contend that he was not a bona

fide purchaser" (R. 100). Under this admission, it was conceded that title passed and now rests in appellee. Therefore, even if appellee's contentions, based upon failure by appellant to raise this issue in a proper or timely manner, are overruled, the only question is whether the sale is voidable, not whether it was void "ab initio".

If, however, this Court desires to consider the merits of this issue, and without waiving this point, appellee submits the following argument on the merits.

B. Findings of Fact that Sale was a valid Sale and was authorized by Agent of W.A.A. are Conclusive and, at least, are not "Clearly Erroneous."

The entire basis of the findings of fact by the trial court is that the sale was a valid sale. Thus, the findings refer to "said sale," without qualification, at least eight times (R. 35, 36, 37). The trial court also found that "Said War Assets Administration * * * issued directions that this residue be placed on sale at the best price offered * * *" (R. 34), and, later, that "Said sale at said price was then authorized by an agent of the War Assets Administration" (R. 35-36).

Neither by designation of the points upon which appellant intended to rely nor by specification of error has appellant attacked the findings of fact made by the trial court. Therefore, appellant cannot now complain as to any finding of fact or as to the sufficiency of the evidence to support any such finding. *Cohen v. United States*, supra.

But if this Court should desire to consider whether such findings are "clearly erroneous"—the test to be applied where the question has been properly raised—it is submitted that the record in this case supports the findings. Appellant relies on the fact that the "uncontradicted evidence shows that Mudge alone had authority to make such a sale and that the delegation of authority was limited to sales on a bid or fixed price basis" (Govt. Br. 16). The only references therein, however, were to the testimony of the agents themselves, and this testimony, far from being conclusive, was conflicting. The only written evidence on extent of authority was War Assets Administration Bulletin No. 80, which, as we recall, did not restrict the maximum limitations stated therein by reference to bid or fixed price sales (Dft. Ex. 5). Mudge originally testified that there was no question as to lack of authority to make the sale (Dft. Ex. 13, p. 11; see also R. 160, 161). Burgoyne testified that the sale was authorized by Zannon (R. 203), who was described by Givens as one of those having authority to approve sales up to \$100,000.00, without qualification as to type of sale (R. 61). Zannon's attempted claim of misunderstanding that when he signed the sales documents he thought it was a bid sale from the marking on the documents was contradicted by the testimony of Webb (R. 75, 80) and is subject to disbelief by the trial judge (see *supra*, p. 5). Moreover, there was testimony that Williams, as head of the Committee on Bids and Awards (and with authority up to \$100,000.00, R. 61), had authorized that the sale of the undisposed residue in question be made at the best price that could be negotiated (R. 216; see also R. 73, 215, 235). No testi-

money was offered by the Government to show that Williams did not have approval of his committee, or that such approval was necessary, and it is admitted that no other offers were received by the Government; that the goods were on hand for several days and that there was considerable negotiating before the price of \$75.00 was accepted by Jones (Gvt. Br. 45-46). Thus there was sufficient testimony to sustain the findings that the sale was properly authorized and was not void for lack of authority and, at least, such a finding was not "clearly erroneous" under such a record. (See also, *supra*, pp. 4, 5.)

C. Appellee was a Bona Fide Purchaser for Value and under the Surplus Property Act his Title is therefore Conclusive and cannot be set Aside.

Although appellee strongly denies that the sale in question was either void or voidable for excess or absence of proper authority, appellee next contends that any such lack of authority is wholly immaterial in this case by reason of the terms of section 25 of the Surplus Property Act, 50 U.S.C.A., appendix, sec. 1634, as follows:

"Conclusiveness of Title of Purchaser. A deed, bill of sale, lease, or other instrument executed by or on behalf of any Government agency purporting to transfer title or any other interest in property under this Act shall be conclusive evidence of compliance with the provisions of this Act insofar as title or other interest of any bona fide purchasers for value, or lessees, as the case may be, is concerned."

Both in the pleadings and at the trial defendant took the position that documents purporting to transfer title were delivered to him; that he was a bona fide purchaser and that under this statute his title was therefore conclusive and could not be set aside (R. 31, 99, 106; Dft. Ex. 11). Since this was such a basic issue in the case it is difficult to understand why the Government has failed to discuss the issue in its brief, unless it hopes to gain advantage by forcing appellee to make the opening argument on this issue in order that the Government can then reply, without any opportunity to appellee to answer the Government position on this issue, whatever it may be. This is a further reason why the Government appeal should be dismissed for failure to comply with the rule relating to specifications of error, since the specifications in this case give appellee no inkling of the Government position on appeal on this vital issue.

Moreover, the findings of fact by the trial court, not attacked by a proper or any specification of error, found as follows:

“ * * * nor did defendant have any knowledge or reason to know that plaintiff or its agents made any such mistake or lacked authority to make said sales. No representation or fraudulent act or inducement, either actual or constructive, was made or engaged in by defendant and defendant acted in good faith at all times. Nor is there any evidence that plaintiff or its agents were misled by defendant in any way from any act, inducement or representation by defendant and there was no concealment of facts or imposition.” (R. 35).

and, further, that:

“On said date defendant accepted said offer and tendered and paid the sum of \$75 to plaintiff, which said tender was accepted. *** Thereafter, on November 6th, 1946, a bill of sale was executed and delivered to defendant by and on behalf of said War Assets Administration purporting to transfer title of all items of personal property, including said universal gear joints, to defendant and warranting that plaintiff and its agents had the right to sell said goods to defendant.” (R. 35-36).

Appellant has conceded that title passed with the execution and delivery of the bill of sale to Jones (R. 100), subject only to being set aside if the sale was not authorized or if Jones was not a bona fide purchaser. It is submitted, however, that, regardless of this concession, the above findings completely satisfy the requirements of Section 1634 of the Surplus Property Act, *supra*, by establishing its two requirements: (1) That a “bill of sale” was “executed by or on behalf of” the War Assets Administration “purporting to transfer title” to Jones; (2) that Jones was a “bona fide purchaser for value”. It follows that this bill of sale must be accepted as conclusive evidence of compliance with provisions of the Act. Thus there can be no contention that the sale was invalid as not being authorized by the Act or by regulations or other delegations of authority thereunder, or that the sale was otherwise upon terms violating the provisions or policies of the Act. By the terms of the Act and under the findings of fact in this case, the bill of sale is “conclusive”.

Apparently, however, appellant still takes the position that in spite of this Act and these findings of fact that, (1) there was no proper bill of sale within the meaning of the Act; and, (2) that Jones was not a bona fide purchaser. (See Gvt. Br. 17 and R. 107).

1. BILL OF SALE TO JONES SATISFIED REQUIREMENTS OF ACT.

Section 25 of the Surplus Property Act (50 U.S.C.A. App. Sec. 1634) refers to a "bill of sale * * * executed by *or on behalf of* any government agency *purporting to* transfer title * * * *shall be conclusive evidence of compliance with the provisions of this Act * * **".

We submit that nothing could be more clear. The words "on behalf" and "purporting" clearly show an intent that title is transferred by a bill of sale whenever executed "on behalf" of W. A. A., even though by an agent who had no authority and therefore could only "purport" to transfer title. Any doubt that such was the intent of Congress is removed by the further provision that such a document shall be "conclusive".

That such must have been the intent of Congress also appears to be clear from the circumstances giving rise to the Surplus Property Act and the problems to be dealt with under its provisions. When the Act was enacted in the fall of 1944 the end of the War was in sight and the stage was being set for the greatest forced sale in history. Huge quantities of war surplus commodities had been accumulated, ranging from shoe-laces to B-29 bombers. The Government was naturally

anxious to escape the tremendous burden of storing and maintaining these surplus stocks. Thus the policy was not to hold for the last possible penny and to withhold sales documents until the contracts and documents of title for all of the billions of items could be examined and approved by government auditors and attorneys, as in the usual course of government transactions, but, as stated in the Act, to dispose of this huge surplus "as promptly as feasible" (50 U. S. C. A. App. Sec. 1611(r)).

Since much of the goods involved had considerable value and in order to protect the purchasers of such goods at sales conducted in such haste in their titles from the possibility that after a sale was consummated some government auditor or attorney might find some technical defect or lack of proper authorization or approval, and in order to prevent the uncertainty, confusion and consternation that would naturally be the result in such an event, it was both natural and reasonable that a provision such as Section 25 was included in the Act. As held by the Supreme Court of the United States in *Muschany v. United States*, 324 U. S. 49, 66:

"It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated."

It thus appears that Section 25 of this Act was intended to apply to just such situations as involved in this case, where a bill of sale is executed and delivered and appears to be regular on its face but where the Government later contends that there was some mistake or lack of authority in its execution.

An examination of the bill of sale in this case shows on its face that it was not only signed on behalf of W. A. A. and purported to transfer title but that it warranted the right of W. A. A. to transfer title (Dft. Ex. 11). Thus it clearly satisfied the requirements of Section 25. Indeed, if all bills of sales to war surplus goods could be set aside on such grounds, Section 25 would be stripped of all meaning and rendered a complete nullity. Therefore, the only way to give it any meaning or effect is to hold that it was intended to protect bona fide purchasers to whom documents of title appearing regular on their face have been delivered by the Government, even though there was some mistake or lack of authority in the execution of such documents.

Although it is thus appellee's position that the terms of Section 25 are clear and unambiguous and require no reference to legislative history as an aid to interpretation, it is submitted that any doubts that in enacting this provision Congress had the intent set forth above are at once set to rest by reference to House Report No. 1757, 78th Congress, 2nd Session, p. 17, where the following statement of legislative intent is made:

“Section 10(a) of the committee amendment authorizes any agency disposing of property under the act to do so, subject to the other provisions of the act, by sale, exchange, lease, transfer, or other disposition for cash, credit, other property or otherwise, with or without warranty, and upon such other terms and conditions as the agency deems proper. Section 10(d), (Section 25 of the final draft), makes any instrument, executed by or on behalf of an agency, purporting to transfer title to property under the act, conclusive evidence of com-

pliance with the provisions of the act, insofar as the title of any bona fide purchasers is concerned. *These two provisions are designed clearly to assure to purchasers that agencies selling property of the Government have full authority to do so, and that the purchaser's title cannot be invalidated because of any failure of a Government agency to comply with a requirement of the act.* These enabling provisions clarify the law on the subject, and the committee considers them of major importance."

2. JONES WAS A BONA FIDE PURCHASER FOR VALUE.

Apparently the Government may also take the position that Jones was not a bona fide purchaser for value upon the grounds that he was put on notice of mistake or lack of authority by the apparent disparity between the actual value and the selling price of the goods and that he was bound by law to take notice of any limitations on the authority of the government agency with which he dealt.

As to any claim of apparent disparity between actual value and selling price sufficient to put on notice of mistake or lack of authority, it is submitted that any such claim is at once put to rest by the following finding of the trial judge:

"There is no substantial evidence to establish the value of said items at the time of said sale other than that the value of said items, and in particular of said universal gear joints, was substantial, but that the exact value of said goods was questionable and speculative, which said facts were recognized both by plaintiff, its agent and defendant and all

of said negotiations, including the determination of said price and their subsequent sale, were the deliberate and intentional acts of plaintiff, its agents, and defendant, * * * ". (R. 35-36).

Since appellant has not challenged the accuracy of these findings of fact by a proper or any specification of error, it cannot now be heard to complain. But, in any event, the finding is clearly supported by evidence that at the time of the purchase Jones knew that the goods had been included in a special offering but that no bids were received for these goods, even from scrap dealers (R. 129); that each joint would have to be taken apart to separate the bronze from the steel before the goods could even be sold for scrap (R. 153); that he didn't know of their purchase price or weight until later (R. 134, 152); that he had previously heard of a number of instances in which goods had been sold by the War Assets Administration for but a fraction of their original cost (R. 126, cf. 167, and Dft. Ex. 13, p. 38). Then too, even the Government had previously refused to place a value on the goods in question (Dft. Ex. 13, p. 32). See also, *supra*, pp. 7, 8.

As to any claim that Jones was bound by law to take notice of any limitations on the authority of the War Assets Administration or its agents, it is submitted that the provisions of Section 25 of the Act expressly remove any such requirement. As stated in House Report No. 1757, *supra*, at p. 17, the purpose of this provision was "to assure purchasers that agencies selling property of the Government have full authority to do so * * * ". If, on the other hand, Congress had intended that pur-

chasers from the War Assets Administration were still to assume the risk of discovering any lack of authority to sell and were to be put on constructive notice of any defects in the existence of such authority, there would have been no reason to include Section 25, and to now hold that such was the legislative intent would completely nullify Section 25.

In addition, it is to be noted that Section 25 used the term "bona fide purchaser for value". Congress did not use the term "bona fide purchaser for value *without notice*", as now commonly used, as under the Uniform Sales Act (cf. Section 71-124, O.C.L.A.), but omitted the requirement concerning absence of notice. The fact that the factor of "value" was specifically mentioned in addition to the requirement of "bona fides" makes even clearer the intent to omit any requirement as to "notice". Thus it is clear that Congress used the term as defined by the United States Supreme Court in *United States v. Des Moines Nav. & R. Co.*, 142 U.S. 510, 530, as follows:

"But the term 'bona fide purchaser' has a well-settled meaning * * * Anyone is a bona fide purchaser who buys in good faith and pays value."

Moreover, as also held in that case (which was a suit by the Government to cancel a patent to land issued to an alleged "speculator") in order to set aside "evidence of title", issued by the Government,

" * * * the evidence in support must be clear, strong and satisfactory. Muniments of title issued by the Government are not to be lightly destroyed."

It seems clear that the whole purpose of Congress in enacting Section 25 was to go beyond the protection of "bona fide purchasers," if understood in a technical sense, to require total absence of notice, constructive as well as actual. Such purchasers already had full protection, even in the absence of statute. The reference in Section 25 that as to a bona fide purchaser a bill of sale was to be conclusive as evidence that the sale was *in compliance with the Act* further makes it plain that the intent of Congress was to protect against the very contention made in this case, i.e., that the sale was not in compliance with the Act and of the myriad and numberless administrative regulations issued thereunder by the War Assets Administration—whether for non-compliance with some remote regulation, mistake, or for any other reason, so long as the purchaser acted in bona fides and paid value. Therefore, the omission of the requirement "without notice", as used in the Uniform Sales Act, must be deemed to have been deliberate.

For a case bearing quite directly on this question, see *United States v. Winona & St. Peter R. Co.*, 165 U. S. 463, 477 ff., in which the Government attempted to cancel a land patent, charging that the purchaser was not a bona fide purchaser, but was charged with notice of public records showing a mistake, and it was held, under a statute protecting bona fide purchasers, that if the purchaser acted in good faith his title was conclusive under that statute, regardless what constructive notice might be chargeable to him.

Therefore, it follows that if in this case Jones was in good faith when he made the purchase and paid "value", his title is conclusive. As to the requirement of "value", it is clear that the payment of \$75.00 was sufficient, since that term is defined in the Uniform Sales Act as "any consideration sufficient to support a simple contract" (see Section 71-176(1), O.C.L.A.). As for the requirement of good faith, we believe that the testimony and evidence, including the admissions of the government agents, as outlined above (pp. 6-10), and as found by the trial judge (R. 34-36), was more than sufficient to establish his complete good faith, even if defendant had that burden, and was far less than sufficient to sustain the burden on the Government to prove his bad faith.

But even if, in order to be a "bona fide purchaser" under this statute, he must have been without notice, which we strenuously deny for the reasons stated above, it was not established and cannot be said that Jones had notice, either actual or constructive, of any lack of authority (of Burgoyne) to make the sale.

Even if it be conceded, which we do not, that Jones was put on constructive notice of Bulletin No. 80 (Plf. Ex. 5), which limited Burgoyne's authority and which was never even published with the countless regulations in the Federal Register, the fact remains that the sale was, to his knowledge, approved by Zannon (see Dft. Ex. 11); that Zannon had ample authority and that the sale was also originally authorized by Williams, who also had ample authority (see *supra*, pp. 3-5). The

testimony of Zannon that he did not know what he was doing and assumed that the sale was on a bid basis, as marked on the form W. A. A.-2, can be given no consideration, since the Government has contended that none of its agents (including both Zannon and whoever prepared Form W.A.A.-2) were negligent (P.T. Order, Gvt. Br. 51). It must therefore be presumed that Zannon read the sales memorandum and knew that it constituted a sale to Jones of the goods in question for \$75.00.

In any event, here the question was not one of lack of authority but of an alleged mistake, made in the exercise of admitted authority. The sale was authorized and approved by agents who had full authority to do so, the only question here involved, and, so far as notice to Jones is concerned, it surely cannot be said that he was put on actual or constructive notice that Zannon didn't know what he was doing when he signed the Form W. A. A.-2, or that any other mistake was made by the government agents not brought to his actual knowledge. Whether there was such mutual or unilateral mistake as to afford a separate ground for avoiding the sale (as discussed below) is an entirely separate matter—the only question here involved being whether the Government has sustained the burden of proving that Jones had actual or constructive notice of lack of their authority. Since, for the foregoing reasons, the Government clearly has not sustained this burden of proof, it follows, under Section 25 of the Surplus Property Act, that the title of Jones to the goods in question is con-

clusive and that the sale cannot be rescinded or set aside for lack of authority.

D. Sale not Invalid as at an Inadequate Price.

Appellant next argues that the sale was invalid because at a "grossly inadequate price," contrary to provisions of Section 2 of the Surplus Property Act providing that sales should be at fair prices (Gvt. Br. 18). It should first be noted that Section 2 is but a part of the "declaration of general objectives" of the Act and that there is no express provision that sales made at inequitable prices shall be invalid. It should next be noted that Section 2(r) and Section 2(t) of the Act (50 U.S.C.A. App. Sec. 1611) not only declare as an objective that the Government shall "as nearly as possible" obtain the "fair value" of surplus property, but that surplus property shall be disposed of "as promptly as feasible * * *". These requirements have been interpreted by W. A. A. as follows:

"All sales of surplus war property, * * * will be made in accordance with the policies, regulations or directions of the Administrator or, with his authority, of the disposal agencies. In the absence of specific directions, * * * sales may be made in such manner as the selling agency shall deem advisable, adhering to *the primary principal that a reasonable test of the market*, having due regard for the nature, condition, quantity and location of the property, *is a necessary prerequisite to any sale.*" (Title 32, Code of Fed. Reg. Ch. XXIII, paragraph VI).

Here it cannot be denied that there was a reasonable test of the market, since Special Offering was even sent

to 4,723 dealers, including scrap metals dealers (Dft. Ex. 9), and it was admitted that the Government had exhausted all efforts to obtain a higher price (Dft. Ex. 14, pp. 24-25). By the same token, and for other reasons set forth below, it was not established by the Government that the price obtained for these goods was not "as nearly as possible" the "fair value" of the surplus property involved. Moreover, the trial judge specifically found as a fact that "a reasonable test of the market had been made" (R. 34). This Court should take judicial notice of the fact that, by virtue of the necessities of the gigantic disposal problem faced by the Government, war surplus goods were often sold at but a fraction of their original cost, as was both contended and admitted in this case (R. 126, 167, Dft. Ex. 13, p. 38). Therefore, it is highly improper to compare such a sale with private sales made under ordinary circumstances, as the Government would now adopt as a standard.

This is not a case such as *Hume v. United States*, 132 U. S. 406, as cited by the Government (Govt. Br. p. 18). In that case there was both an obvious mistake by the government agents plus a finding of fact that the actual market value was but a fraction of the amount sued for. Nor is this a case in which it is established by the record that a sale was made at a price below the fair market value or less than a reasonable price. Here, on the other hand, the trial judge has specifically held that there was no mistake by either party (R. 35); there is no finding as to the actual market value of the goods, but, on the other hand, a finding that the value was "questionable and speculative", as recognized by both parties (R. 35).

At the risk of reiteration, it must be constantly borne in mind that in this case the goods in question had been offered for bids to 4,723 dealers, including dealers in hardware, equipment and scrap metals, without receiving a single bid (Dft. Ex. 9). In order to sell the goods even for scrap, at the price of \$2,260.00, quoted by government witnesses, it would first have been necessary to incur the labor cost of taking apart each of over 40,000 gear joints to separate the bronze from the steel (R. 94, 95, 153). While it is true that Jones had later placed a high value on the goods in connection with his action for replevin, he declined to place any value on the goods even in that case until forced to do so by the Government (see Dft. Ex. 12, original Complaint), and in that case the Government denied that the goods had any value (Id. Gvt. Answer; see also Plf. Ex. 13, p. 32). It is also now admitted by the Government that it "did not offer any evidence as to the market value of the Universal gear joints" (Gvt. Br. 19).

Thus the Government has not satisfied the burden of proof to establish its contention that the price was grossly inadequate or unreasonable, and the findings of fact by the trial court, which are not challenged by any specification of error, are directly to the contrary.

Finally, the Government does not complain of the price received for the other items sold to Jones (R 161), including a dump truck body for \$.06, costing \$50.00, and two jeep motors at \$.28 each, costing \$257.70, together with other items similarly priced, all as set forth in Plf. Ex. 3. It must therefore be assumed that

the Government does not regard the sale of such items as invalid because of the price obtained. There is considerable evidence in this case that the Government often sold war surplus goods at but a small fraction of their original cost, particularly where, as here, no bids had been received, and that no such sale had ever been set aside, even though questioned (R. 136, 167; Dft. Ex. 13, pp. 36-39). Therefore, to hold, as the Government contends, that this sale should be set aside for inadequacy in price alone, would not only be wholly inconsistent with the conduct of the Government in other instances, but would place in jeopardy the titles in thousands of sales of surplus war commodities subject to the whim of some Government agent or attorney based upon some audit or investigation in the indefinite future.

That such was not the intent of Congress in adopting the Surplus Property Act is again made clear by reference to Section 25, which protects bona fide purchasers not only against claims that a sale was not in compliance with the Act by reason of technical excess of authority by government agents, but also against the present contention that a sale was not in compliance with the Act by reason of inadequacy of price.

II. NO MATERIAL MISTAKE WAS MADE BY GOVERNMENT AGENTS.

Appellant next argues that the sale should be rescinded because of the alleged failure of the government to know the nature or value of the Universal gear joints (Gvt. Br. 20-23).

Here again, appellant's specifications of error will be searched in vain for any specification raising the issue of alleged mistake, either directly or as a reason in support of any specification, as required by Rule 20. Even specification 5, which complains that the trial court erred in holding that plaintiff was not entitled to rescind the sale completely, fails to do so. Therefore, the claim of alleged mistake should not be considered by this Court for lack of a proper or any specification of error. If, however, this Court desires to consider the merits of this issue, and without waiving this point, appellee submits the following arguments on the merits.

A. Findings of Fact that no Mistake are Conclusive.

The following findings of fact were made by the trial judge on the question of mistake :

“Defendant was shown by said War Assets Administration a complete and accurate description of all of the items of said residue. Both plaintiff, its agents and defendant were familiar with the nature of said items. There is no substantial evidence to establish the value of said items at the time of said sale other than that the value of said items, and in particular of said universal gear joints, was substantial, but that the exact value of said goods was questionable and speculative, which said facts were recognized both by plaintiff, its agents and defendant and all of said negotiations, including the determination of said price and their subsequent sale, were the deliberate and intentional acts of plaintiff, its agents, and defendant, and the means of information as to the value of said goods were open alike to all of said parties.

“No mistake was made by either plaintiff, its agents, or defendant as to the identity, nature or

value of said items, including said gear joints, nor was there any mistake that determined the conduct of either plaintiff, its agents, or defendant, nor did defendant have any knowledge or reason to know that plaintiff or its agents made any such mistake or lacked authority to make said sales." (R. 34-35).

Since, as noted above (p. 19), there is no specification of error whatever which challenges the findings of fact made by the trial judge, the above quoted finding that there was no mistake must be accepted as conclusive on this question.

B. *Grounds for Rescission Insufficient under Oregon Law.*

Since the contract in this case was made in Oregon, the law of Oregon is controlling. As held by the Oregon Supreme Court in *Leonard v. Howard*, 67 Or. 203-212:

"We are not aware of any rule of law or morals that requires a person soliciting bids for services to performed to warn the bidder that his bid is so low that he may lose money by complying with its terms."

See also *Winklebleck v. Portland*, 147 Or. 226, 242, applying a similar rule to mistakes by government agencies. As further held in *Manley v. Smith*, 88 Or. 176, 190:

"* * * when parties have reduced their covenants to writing it must be held to contain all the terms in the absence of fraud or mutuality of mistake."

Even courts holding that unilateral mistake may be sufficient to set aside a contract, hold also that if there

has been any negligence by the plaintiff he cannot rescind (9 *Am. Jur.* 378, 379).

This rule has not only been applied in Oregon in the *Leonard* case, *supra*, but also by the Supreme Court of the United States in *Grymes v. Sanders*, 93 U. S. 55, at 61, in which it was held that

“Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence ‘which may be fairly expected from a reasonable person’.”

In this case the only mistake urged on appeal is unilateral, i.e., on the part of the Government. It is also conceded that the terms of the sale were reduced to writing, which described the goods and their price and warranted title (Dft. Ex. 11). Thus the only grounds on which the sale can be set aside, under Oregon law, are for fraud or mutuality of mistake, neither of which was established at the time of trial nor is urged on this appeal.

Moreover, even on a theory of unilateral mistake, the Government is barred by its own negligence in failing to read the written documents describing the goods and stating their original cost (R. 83, 92, 232-233; see also Plf. Ex. 1, 3 and 4 and Dft. Ex. 9 and 11). On the other hand, if the Government should deny negligence (Govt. Br. 51), then it would follow that its agents must be presumed to have been familiar with this information, in which event they could have made no mistake in selling

the goods to Jones at the terms specified in the sales documents (Dft. Ex. 11).

C. Any Alleged Mistake was not Material.

The Government correctly states the proposition that in order to set aside a contract for alleged mistake "the mistake itself must be so important that it determines the conduct of a mistaken party or parties" (Govt. Br. p. 21). In this case the only mistake claimed by the Government is that its agents were mistaken as to the nature and value of the goods for the reason that they thought that the gear joints were automotive equipment and not marine equipment.

But the Chief of the Automotive and Machinery Division of W. A. A., under whose direction the special offering was prepared and sent out and who personally made the sale to Jones (R. 80, 90), testified on deposition that even if the gear joints had been automotive equipment they would have had considerable scrap value (R. 94, 202); that even if he had realized that the gear joints were marine equipment and not automotive equipment it would not have changed the program for the sale of these goods and that "there is nothing that we could have done to offer them in any other way * * * except just taking a chance by reprogramming them like we did. We reprogrammed them and tried to get bids again" (R. 205). It must also be recalled again that the special offering for these goods was sent to 4,723 dealers, including dealers in hardware, equipment and scrap metals, but was *not* sent to automotive parts dealers (Dft. Ex. 9. See also, *supra*, pp. 2-5.)

Therefore, even if the findings on lack of mistake are open to question in this case, which appellee denies, it is clear from the evidence that any such mistake was not responsible for the failure to receive bids from other dealers and did not determine the conduct of the Government.

D. Jones had no Knowledge or Reason to know of Mistake.

The Government next contends that the sale should be rescinded for the reason that Jones knew or had reason to know that the government agents made a mistake as to the nature and value of the goods because there was an obvious disparity between the value of the goods and the price paid for them (Govt. Br. 21-23). Here again the trial court made findings unchallenged by specifications of error which completely foreclose this argument (R. 35). But even if these findings are open to question, which appellee denies, it is again clear from the evidence that the findings are supported by the evidence and that this was not a case of "obvious error", such as the actual recognition of a valuable jewel placed by mistake for sale with dime store jewelry or the making of an obvious error in a quotation of the price of lumber.

The evidence is uncontradicted that before the sale Jones had heard that the War Assets Administration on a number of instances had sold goods at a very small fraction of the original cost to the Government (R. 126); that he was told that the special offering had been sent out, even to scrap dealers, but that no bids were re-

ceived (R. 129) ; that he was shown by War Assets Administration sales agents a description of the goods which was admittedly complete and accurate, and thus knew that they were acting on the basis of such information (R. 129 ; see also R. 92, 221 and P. T. Order, Gvt. Br. 45, 46) ; that at the time of the sale he didn't know the original cost of the goods to the Government or the weight of the goods (R. 134, 152) ; that he knew that the goods cost more then he paid for them, but didn't know whether he could sell them and that to sell them for junk each joint would first have to be taken apart to separate the bronze from the steel (R. 129, 153, 94, 95).

Therefore, under this evidence, there is no reason for the Government's contention that Jones knew or had reason to know that the Government had made a mistake. See also, *supra*, pp. 6-10.

E. Price was Result of Deliberate Act by W. A. A. with Full Information as to Nature and Value of Goods.

Finally, it is contended by the Government on the issue of mistake that Jones had the burden of proof to establish that the price was the result of a deliberate and intentional act by the parties (Gvt. Br. 22). Without conceding this contention, it should again be noted that the trial court specifically found that all of the negotiations for the sale, including the determination of the price, were the "deliberate and intentional acts of plaintiff, its agents, and defendant", and that "the means of information as to the value of said goods were open alike to all of said parties" (R. 35).

These findings were not only unchallenged by any specification of error but were also not among the findings elsewhere challenged in appellant's brief (Govt. Br. 31-34). Thus they cannot now be questioned. Moreover, one who deliberately and intentionally enters into a contract and determines a price for the sale of goods, with full information as to value before him, cannot be said to have made any mistake at all as to the nature and value of the goods sold. Thus this finding is conclusive of the entire question of alleged mistake, regardless of the other arguments and grounds urged herein.

But even if these findings are open to question, which appellee emphatically denies, it is clear from the evidence that the findings are supported from the evidence. There is no contention that Jones made any mistake as to the nature and value of the goods. It is, however, contended that the Government was not negligent in the transactions leading to the sale (P. T. Order, Govt. Br. p. 51). Thus it must be presumed that the government agents read and were familiar with such information as was available to them.

It is admitted that the government agents had in their possession full and complete information as to the nature and value of the goods in question, including their original cost (Plf. Ex. 2, 3 and 4), which was apparently completely understood, as evidenced by their preparation of a Special Offering, which admittedly included a "full and complete description" of the goods (P. T. Order, Govt. Br. 45); that a reading of this description would put a person on notice of the value of the goods

involved (R. 92, 206) ; that all attempts to secure bids on these goods were unsuccessful, although they were offered for bids to 4,723 dealers, including dealers in scrap metals (Govt. Br. 45; see also Dft. Ex. 9) ; that all attempts to sell the goods had been exhausted and that the government sales program would not have been changed even if the W.A.A. agents knew that the gear joints were not automotive equipment (R. 205). There is also evidence in the record that the goods had first been offered for \$900.00 or \$1,000.00 and later for \$250.00 before being offered for sale at \$75.00 (R. 127) ; that where, as here, goods were offered for bid and no bids were received, they were often put up for sale at the best price offered and often sold for but a fraction of their original cost and that this sale was in accord with the W. A. A. custom and practice (R. 167; Plf. Ex. 13, p. 38; R. 89).

Therefore, even if defendant had the burden to establish that the sale was the result of a deliberate and intentional act by the Government, which appellee denies (36 *Am. Jr.* p. 456), that burden has been fully satisfied by the proof, and the findings of fact by the trial judge are fully supported by evidence and are not "clearly erroneous". As stated in 46 *Am. Jur.* p. 265, it is established law that

"A mistake relating merely to the attributes, quality or value of the subject of a sale * * * is not sufficient to authorize a court to rescind the contract of sale at the suit of the aggrieved party, where the means of information were open alike to both parties and there was no concealment of facts or imposition."

As further held in *United States v. Standard Rice Co.*, 323 U. S. 106, 111:

“Although there will be exceptions, in general the United States as a contractor must be treated as other contractors in analogous situations * * *. We will treat it like any other contractor and not revise the contract which it draws on the grounds that a more prudent one might have been drawn.”

III. DECISION PROPER WITHOUT FURTHER DECLARATORY RELIEF.

The amended complaint by the Government contained the following prayer:

“Wherefore, Plaintiff prays; (1) that a decree be rendered declaring the *purported sale* to be void and Plaintiff to be the owner of the aforementioned property purported to have been sold to the Defendant. (2) That a Decree be rendered to vacate, set aside, and rescind the aforementioned purported sale. (3) For a declaration of the rights and duties of the party hereto under and by virtue of any agreement arising under the aforementioned transactions between the Plaintiff’s agents or agents and the Defendant. (4) For such other relief * * * ”. (R. 27).

The original complaint asked only that the sale be “vacated, set aside and rescinded”, with no request for declaratory relief (R. 6). The plaintiff’s requested relief in the proposed pre-trial order (which was not signed and is not a part of the record) is similar to the amended complaint, with the addition of a prayer relating to tender and status quo (Govt. Br. 52).

The trial court concluded as a matter of law that "Plaintiff is not entitled to rescind said sale or to the other relief prayed for by plaintiff herein, and the action shall be dismissed for want of equity" (R. 37-38). It should also be noted, however, that the trial court found as a fact that there was no mistake, thereby rejecting the Government's claim on that basic issue, and that defendant was a bona fide purchaser for value to whom a bill of sale had been executed and delivered by and on behalf of the W. A. A. purporting to transfer title to the goods purchased, thereby satisfying the requirements of Section 25 of the Surplus Property Act and rejecting the government claim that the sale was void for lack of authority (R. 34-36).

The Government has now sought to amend its brief by adding the following specification of error:

"7. In holding and concluding that the plaintiff was not entitled to a decree declaring the rights and duties of the defendant and the plaintiff under and by virtue of any agreement arising under transactions between defendant and plaintiff's agent or agents." (Govt. Br. between 16 and 17).

Without waiving the contention that the foregoing was not a proper specification of error in not stating wherein the foregoing findings and conclusions were alleged to be erroneous, as required by Rule 20, defendant submits that the decision of the trial court was entirely proper without granting any further declaratory relief.

A. *Findings, Conclusions and Judgment sufficiently declared Rights and Duties of Parties, settled the Issues in Dispute, and terminated the Controversy.*

The Government in its brief states that the remedy of the Declaratory Judgments Act is appropriate "where a public authority seeks a declaration that the contract entered into by it was void or voidable" (p. 24). But in this case the Government did not ask for any such declaration, but only "for a declaration of the rights and duties" of the parties under the agreement (R. 27).

It is obvious from the pleadings in this case that the primary "right and duty" which the Government desired to have decided in this case was whether it had the right to rescind the sales in question. This was emphatically decided by the trial judge in holding that the Government "is not entitled to rescind said sale". Not only did the trial court so hold, but, by the findings set forth above, also resolved decisively the two basic contentions advanced by the Government: (1) That of mistake, and (2) that of lack of authority. (See R. 20-26; Gvt. Br. 48-53). As stated in *Anderson, on Declaratory Judgments*, p. 534:

" * * * The power of the Court to grant relief in such proceedings is dependent upon and circumscribed by the pleadings formulating the issues therein. * * * There is no right to an adjudication regarding matters about which there is no issue or contention."

It is therefore submitted that, while perhaps not in the strict form of a declaratory judgment, the decision by the trial court did substantially declare the rights of

the parties as to the only basic issues raised by the pleadings and, as such, is not subject to reversal upon the ground set forth by this specification of error.

To have gone further and to reiterate these same conclusions in the form of a declaratory judgment would have "served no useful purpose in clarifying and settling the issues of the case," which had already been well settled by the decision, as explained above. Nor would such a form of judgment have added anything to "terminate the controversy", to paraphrase *Borchard on Declaratory Judgments* (2nd Ed.) p. 299. In other words, such an addition to the findings, conclusions and judgment of the Court would have been "superfluous" and would not have "served any useful purpose", and, therefore, was properly refused. (*Borchard*, *supra*, pp. 306, 307).

Finally, it is settled law that a declaratory judgment may be denied where another case is pending between the same parties on the same issues. *Anderson*, *supra*, p. 529. If this is true, then it should follow, a fortiori, that where, as here, the complaint in the *same case* requests direct relief on the same issues, a further or alternative prayer for declaratory relief is properly denied. Here the Government asked that the sale be held to be void and be vacated, set aside and rescinded (R. 27). These prayers involved the same issues of mistake and lack of authority as the further prayer for a declaration of the rights and duties of the parties under the agreement of sale. Therefore, since the trial court directly decided the prayers for direct relief by holding

that the Government had no right to rescind the sale, it follows that there was no error in not granting a further declaratory judgment on the same issues.

B. Granting or Denial of Declaratory Judgment is Discretionary.

That the granting or denial of a declaratory judgment is a matter within the discretion of the trial judge has been established in many cases. Thus, it was held by the Supreme Court of the United States in *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 462 that

“The declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered.”

Again, it was held in *Brillhart v. Excess Ins. Co. of America*, 316 U. S. 491, 494, that although a Federal District Court has jurisdiction to enter a declaratory judgment, “it was under no compulsion to exercise that jurisdiction”.

Finally, in *Eccles v. Peoples Bank*, 92 L. Ed. Adv. Sh. 592, 596, the most recent and authoritative expression on this point, it was held that

“A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. * * * It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental ac-

tion is involved, courts should not interfere unless the need for equitable relief is clear, not remote or speculative."

The above quoted decisions are all of later date and therefore must be taken as superseding the decision quoted in the Government brief (p. 24).

This same principle has been recognized by this Court in *Lumbermans Mut. Casualty Co. v. McIver*, 27 F. Supp. 702, 706; aff. 110 F. (2d) 323 (C.C.A. 9th); cert. den. 311 U. S. 655. See also *Maryland Casualty Co. v. Boyle Const. Co.* (C. C. A. 4th), 123 F. (2d) 558.

It is therefore submitted that the decision of the trial judge was entirely without error on this issue. The findings, conclusions and judgment in this case were sufficient to declare the rights of the parties under the agreement and also to settle the issues in dispute and terminate the controversy as a practical matter. A further declaratory judgment of the rights and duties of the parties would have been not only superfluous and would have served no useful purpose, but it was also within the discretion of the trial judge in this case, particularly under the circumstances set forth above, to grant or deny any declaratory judgment whatever.

IV. DISMISSAL FOR WANT OF EQUITY PROPER.

Appellant, by specification 3, complains that the trial court erred in dismissing the case for want of equity. Here again, the specification does not comply with the requirement of Rule 20, in that it merely states an ab-

tract proposition of law and does not state wherein or for what reasons the dismissal was in error. This entire case constituted a suit in equity and this specification thus attempts to go to the entire basis of the decision. Cf. *United States v. Cushman* (C.C.A. 9th), 136 F. (2d) 815; cert. den. 320 U. S. 786. Therefore, if there was no mistake by the parties and if the sale was either authorized by the W. A. A. or protected under Section 25 of the Surplus Property Act, for the reasons stated above, then the equitable grounds necessary for relief did not exist and the Court was entirely correct in dismissing the case for want of equity. If, however, this Court should desire to consider argument on the merits of the particular points raised by the Government's brief under this specification, and without waiving the above contention, appellee submits the following argument:

A. Equity will not Partially Rescind a Non-Severable Contract after Partial Execution.

It is established law in Oregon, which controls the contract in this case, that equity will not grant a partial rescission of a non-severable contract and that a party cannot affirm a contract in part and at the same time seek to repudiate it in part, thereby accepting its benefits on one hand while shirking its disadvantages on the other. *Mascall v. Erickson*, 131 Or. 509, 515, citing 13 C. J. 623. In addition, but as a separate proposition, it is established that a party who has partially executed a contract is barred from rescission. 9 Am. Jur. p. 389. Therefore, the question in this case is not solely whether

partial performance was made by the Government, as suggested in the Government's brief (pp. 25-27), but also whether only partial rescission has actually been sought by the Government.

As stated earlier in this brief (pp. 35 to 36), the legality of the sale of all items other than the gear joints has been admitted and never questioned and were delivered to defendant (R. 161, 133); the original complaint requested a rescission only as to the gear joints (R. 2-6); even the amended complaint, filed over a year after the sale and less than three weeks before trial, only asked to rescind the sale as to Lots Nos. 27, 28, 29 and 30, consisting of the gear joints (R. 24); the Government has admitted that it has at all times retained the benefit of payment for all of the numerous other items involved in the sale (Govt. Br. 47-48), with no attempt to regain possession of them or to tender back payment for them (R. 152). Only by bare contention in the unsigned pre-trial order, not properly a part of the record, did the Government attempt even nominally to effect an actual rescission of the entire sale. Thus it is clear, at least as a practical matter, that the Government has sought only a partial rescission of contract, while at the same time enjoying the benefits of the balance of the contract. Under the law of Oregon this is not possible.

The fact that the plaintiff in this case is the Government itself and that the Government is not ordinarily bound by the unauthorized acts of its agents, as next contended in the Government's brief (pp. 26-27), begs

the entire question of whether the sale was properly authorized in this case, as well as the effect of Section 25 of the Surplus Property Act in protecting Jones as a bona fide purchaser. But even assuming that the original sale and delivery was not authorized, it is an established rule of law that once the Government comes into court its conduct thereafter is to be considered by the same standard as any other litigant. *First National Bank v. United States*, 2 F. Supp. 107. Therefore, since when the Government first filed its complaint in this case it asked only for a partial rescission of the sale, and continued in that position until shortly before trial, and continued at all times to retain the benefits from the balance of the contract, the Government is now barred from the right to rescind the contract the same as a private party would be under similar circumstances. Likewise, the position of the Government is not aided by its hasty gestures shortly before trial and over a year after the sale, such as the filing of its amended complaint and its offer in the unsigned pre-trial order to either tender back the entire purchase price or allow defendant to retain all items except the gear joints in dispute and be charged with their value. See also *Railway Company v. McCarthy*, 96 U. S. 258, 267.

B. Failure of Tender and Delay in Rescission Proper Factors for Consideration.

The government waited nearly eleven months from discovery of the alleged mistake to tender even part of the purchase price and to file suit for even partial rescission. It waited over one year to ask for complete

rescission and has never tendered the balance of the purchase price. As held in *Rayburn v. Norton*, 117 Or. 328, 336:

“In pursuit of this remedy of so-called rescission by one of the parties, it is incumbent upon the plaintiff to act promptly and without delay and to surrender to the offending party *all* that the former has received under the contract, so far as it can possibly be done. As said in 2 Black on Rescission & Cancellation, Section 616, speaking on this subject:

“ . . . It is a rule founded on natural justice, and requires that the offer shall be made by the purchaser to his vendor upon the *discovery of the defects for which the rescission is asked.* ”

Here the government did not even offer to do equity in its complaint in this case, as now recognized by the government to be a prerequisite to relief (Gov. Br. p. 27) and made no attempt to do so until the pre-trial order not signed by the Court and not a part of the record in this case. But regardless of what the text-writers cited in the government brief (pp. 27-28) may conceive to be the law, the above quotation represents the law of Oregon which controls the contract in this case. This salutary rule of law should likewise be applied to the government in its contracts made in Oregon, at least when contracting with private parties or when acting in a proprietary capacity, as in this case, and at least as a standard of conduct after the government has voluntarily subjected itself to the jurisdiction of a court of equity.

But even if the failure of tender and delay in rescission are not controlling factors in denial of rescission in

this case, it is submitted that they could be properly considered, along with the other facts of the case, by the Court in determining the equities of the case and whether, as a matter of equity, the relief prayed for by the government should be granted or denied.

C. Movement of Goods Outside State Also Proper Factor for Consideration.

The government is now so bold as to deny that there is any evidence other than pleadings to establish that its agents moved the gear joints out of the state in an attempt to deprive Jones of any effective legal remedy and states that, in any event, the government is not bound by such conduct. (Gvt. Br. 28-29).

But it is established not only by the government's answer in the replevin proceedings (Dft. Ex. 12), but by the shipping memoranda and notice (Dft. Ex. 16 and 17) as well as by admission of the government (Gvt. Br. 51) that when Jones attempted to exercise his legal rights in an attempt to secure the delivery of the goods by filing an action for replevin in the state court, the W. A. A. deliberately moved the goods twice in an attempt to place the goods in another state, outside the jurisdiction of th Court. (See also Dft. Ex. 13, Test. of Buffet) Later the government attempted to defend this action by arguing that Jones still had a remedy for damages (Gvt. Br. 51), but the law of replevin is well established in Oregon in *McIntosh v. Buffington*, 108 Or. 358, 366, as follows:

“If the property recovered has been *lost or destroyed* or if it is *impossible* for any reason to ob-

tain a return of the property recovered, then the judgment will be satisfied by a money payment of the value of the property recovered, but *it is only in such a case that . . . the losing party . . . is entitled to have judgment satisfied upon payment of such value.*"

Thus, it is clear that after attempting to deprive Jones of any legal remedy to seek the return of the goods themselves, and, indeed, of any effective remedy at all, since the value of the goods was admittedly speculative, the government does not come into this Court with "clean hands".

It is not a question of whether the government is absolutely bound or estopped by this conduct of its agents, as denied by the government brief. (p. 29) The question, rather, is whether the rules that one seeking equity must have "clean hands" or not be "in pari delicto" are applicable in such a case. At least the removal of the goods was one of the factors which could properly be considered by the Court in a suit of equity, such as this, in determining whether the equities were such as to justify the relief prayed for by the plaintiff.

D. Other Factors Also Present Which Justified Denial of Relief.

It must also be remembered again that the facts of partial rescission and partial execution, failure of tender and delay in rescission, and movement of the goods outside the state were not the only equitable facts upon which the Court was entitled to base its conclusion that the complaint should be dismissed for want of equity,

nor upon which the judgment in this case can be sustained. Nor is there anything to indicate that these were the sole and only factors considered by the trial judge in deciding this case.

Other equitable factors in this case include the fact that any loss to the government was the result of its own negligence, since it had before it all of the necessary information as to original cost and the nature and value of the goods upon which to fix a proper sales price (9 Am. Jur. p. 391). Another factor of at least equitable consideration is the fact that W.A.A. had made sales of other goods at but a small fraction of their original cost and, indeed, that such was the custom and practice where, as here, goods were offered for bids and no bids were received, (R. 167) and that although the facts of such sales had been called to the attention of W. A. A. officials, none had ever been disapproved or rescinded, at least after sales documents had been issued. (Dfts. Ex. 13, p. 38, 39. See also R. 159)

Finally, it is to be noted that the conclusions of law not only stated that "the action shall be dismissed for want of equity", but *also*, and in the conjunctive, that "Plaintiff is not entitled to rescind said sale or to the other relief prayed for by plaintiff herein." (R. 37-38) Therefore, if the Court correctly considered any of the equitable factors as sufficient grounds for denial of relief the judgment may be sustained. But it also follows that even if the Court was mistaken as to such equitable factors, the decision in this case should still be sustained based upon the separate conclusion that plain-

tiff was “not entitled to rescind the sale or to the other relief prayed for” if the Court was correct in its findings of fact that there was no mistake; that the sale was properly authorized or that Jones was a bona fide purchaser to whom a bill of sale purporting to transfer title was delivered, according to the provisions of Section 25 of the Surplus Property Act.

V. FINDINGS AND CONCLUSIONS NOT INADEQUATE.

The government next argues (1) that the findings of fact and conclusions of law do not resolve the issues raised by the pleadings and pre-trial order; (2) that they do not show the basis for the decision, and (3) that the findings of fact do not support the conclusions of law. (Govt. Br. 29) While this argument is based upon purported specification of error, these specifications again do not satisfy the requirements of Rule 20 in that they do not state “as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous” nor do they direct attention to the specific findings and conclusions complained of. In the event, however, that this Court should desire argument on these specifications and without waiving the point, appellee submits the following:

A. *Findings and Conclusions Furnished Sufficient Basis for Decision.*

As stated by the government, the basic test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues in the case

so as to provide the basis for purposes of decision. (Govt. Br. 30) But it does not follow that the trial court must make findings and conclusions on each and every issue of fact and law that may be involved in a case. As held in *Schilling v. Schwitzer Cummins Co.*, 142 F. (2d) 82, 84, a case relied on in the government brief (p. 30) :

“While counsel may feel disappointed that findings do not discuss propositions sincerely contended for, that, alone, does not make them inadequate or suggest that such propositions were not understood by the court.

* * *

“Certainly, we should not require or encourage trial judges, in preparing findings, to assert the negative of each rejected contention as well as the affirmative of those which they find to be correct.”

As also held in *Kleinkiewicz v. Westminster Deposit & Trust Co.*, 122 F. (2d) 957, citing *McGee v. Nee*, 113 F.(2d) 543:

“The trial court is not required to make findings on all the facts presented and need only find such ultimate facts as are necessary to reach the decision in the case.”

See also *Ladd v. Brickley*, 158 F. (2d) 212, 221.

Therefore, the government may not complain that the trial court made no direct finding that the sale was valid or as to declaratory relief. Moreover, these matters did not involve findings of fact, so as to come within the test of sufficiency, stated in the government brief (p. 30), but were at the most subject to possible conclusions of law. It has already been pointed out that not

only is the entire effect of the decision by the trial court to sustain the validity of the sale, but that the court made repeated and direct references in its findings to the "sale", without any qualification as necessary to intimate invalidity. (Supra, 19.) It has also been pointed out why there was no error in refusing declaratory relief (Supra, 45) and why the findings and conclusions are sufficient to support the decision in this case (Supra, 58).

Moreover, as held in *Sonken-Galamba Corp. v. Atchison T & S. F. Ry. Co.*, 34 F. Supp. 15; aff. 124 F. (2d) 952, cert. den. 315 U. S. 822:

"It would seem that if a party is not willing to give a trial judge the benefit of suggested findings and conclusions, he is not in the best of positions to complain that the findings made and conclusions stated are incomplete."

See also *Rokey v. Day & Zimmerman*, 157 F. (2d) 735.

But the final answer to this contention by the government is again contained in one of its own cases, that of *Shapiro v. Rubens*, 166 F. (2d) 659, 667, which affirmed findings and conclusions by a lower court despite objections on similar grounds to those here contended, in the following language:

"The failure to find the ultimate fact is deemed a finding against the party having the burden of proof . . . and on appeal, all facts not embraced in special findings will be regarded as not proved by the party having the burden of the issue. The failure to find a fact essential to recovery is equivalent

to a finding against the party having the burden to prove the same.”

See also *Container Patents Corp. v. Stant*, 143 F. (2d) 170, and *Walling v. Plymouth Mfg. Corp.*, 139 F. (2) 178, 180.

Therefore, all that can be concluded from the failure to make an express finding or conclusion that the contract was void, as contended by the government, which had the burden of establishing such invalidity, was that such failure is equivalent to a finding that the contract was not void, but was a valid contract.

B. *Any Defects in Findings and Conclusions Not Reversible Error.*

It is well established that a case should not be reversed for failure to make proper conclusions of law where “no useful purpose would be served by remitting the case for a more formal statement of the district judges conclusions of law.” *Green Valley Creamery v. United States*, 108 F. (2d) 342. Thus, as held in *Hurwitz v. Hurwitz*, 136 F. (2d) 796, 799:

“... such findings are not jurisdictional requirements of appeal which this court may not waive. Their purpose is to aid appellate courts in reviewing the decision below. In cases where the record is so clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case. That is the situation here.”

Again, in *Goodacre v. Panagopoulos et al.*, 110 F. (2d) 716, the same rule was stated as follows:

“The District Court evidently failed to comply with the requirement of Rule 52(a) that it ‘find the facts specially and state separately its conclusions of law thereon.’ It does not follow that we must reverse the judgment. Like its predecessor, Equity Rule 70 $\frac{1}{2}$, Rule 52(a) ‘is intended to aid the appellate courts by affording them a clear understanding of the basis of the decision below.’ We have held that, when this clear understanding is afforded, the judgment may stand although the rule is violated.”

VI. FINDINGS OF FACT CONCLUSIVE AND NOT “CLEARLY ERRONEOUS.”

Finally, the government complains in its brief (pp. 31-34) as to various findings of fact made by the trial judge. But the government did not include any attack upon these findings in the statement of the points on which it intended to rely on appeal. (R. 40, 241) Of far greater importance, the government has assigned no specifications of error whatever complaining of these or any other findings of fact by the trial judge. (Govt. Br. 16, insert) It is therefore submitted that these findings of fact are conclusive and binding upon the government and that it cannot now complain as to such findings. As this Court has held many times, any such error will be deemed to have been abandoned on appeal in the absence of proper specifications of error. *Hultman v. Tevis*, 82 F. (2d) 940; *Steinberger v. United States*, 81 F. (2d) 1008. See also *Humphreys Gold Corp v. Lewis*, 90 F.(2d) 896; *Commissioner of Internal Revenue v. O'Donnell*, 90 F.(2d) 907; *Cyclopedia of Federal Procedure*, supra, vol. 12, pp. 17-19.

But even if this Court desires to consider whether the findings of fact in question are properly supported by evidence, and without waiving the above contention, it is submitted that all of the findings in question are supported by sufficient evidence and, at least, are not "clearly erroneous."

The finding that W. A. A. issued directives that the residue be placed on sale at the best price offered is directly supported by evidence that the sale was authorized by Williams; that he had necessary authority to do so and from the testimony that he authorized the sale at the best price obtainable it is at least a proper, if not necessary, inference that the best price offered was the best price obtainable. (See also *supra*, pp. 3, 20.) Moreover, there was also testimony that he put up the residue for sale at the best offer. (R. 119, 215, 216, 235)

The finding that a reasonable test of the market had been made is directly supported by evidence that W. A. A. included the goods in question in a special offering which admittedly contained a complete and accurate description of the goods and was sent to 4,723 dealers, including scrap metal dealers, without receiving a single bid and that the residue was later offered for sale at \$1000 and later for \$250 and held for several days further without any offers whatever. (See also *Supra*, pp. 2, 3.)

The finding that the value of the goods was questionable and speculative is supported by the same evidence and also by evidence that it would be necessary to take each joint apart to separate the bronze from the steel

before they could even be sold for junk and that even government witnesses refused to commit themselves as to the value of the goods. (See also *supra*, pp. 7, 8.)

The finding that government agents made no material mistake has been fully discussed above and is clearly supported by the evidence. (See *supra*, pp. 2-5.)

The finding that Jones had no reason to know of any alleged lack of authority has also been fully discussed above. (*Supra*, pp. 6-10) Indeed, the only claimed notice is that based on the common law theory that persons dealing with a government agent are put on notice as to the extent of their authority, a concept having no application to the facts of this case, particularly in view of section 25 of the Surplus Property Act, as pointed out above. (*Supra*, pp. 28-32.)

But even if all of the above findings were erroneous, which appellee strongly denies, it is nevertheless submitted that the remaining and unchallenged findings are more than sufficient to sustain the decision in this case. Not only are the findings with respect to equitable considerations unchallenged and sufficient as the basis for denial of relief; but, of more importance, the findings that Jones acted in complete good faith, without notice of any mistake or lack of authority and paid value for his purchase, thus being a "bona fide purchaser for value" and that he received a bill of sale executed by or on behalf of W. A. A. and which purported to transfer title to the goods in question, thus completely satisfying the provisions of Section 25 of the Surplus Property Act, are not challenged in any way, either by

specification of error or by argument, except for the argument that, despite the terms of section 25, Jones still had constructive notice of lack of authority. But, as demonstrated above, (*supra*, pp. 28-32) such an argument cannot be made under the facts of this case and would completely nullify the clear and express provisions of section 25, by which Congress stated its intent to give complete protection to purchasers in good faith for value who received from W.A.A. documents purporting to transfer title from any and all claims by the government that such sales had not been made in compliance with the provisions of the Surplus Property Act.

Respectfully submitted,

THOMAS H. TONGUE

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Attorneys for Appellee

APPENDIX A

Office of the Clerk
U. S. Court of Appeals
For the Ninth Circuit
San Francisco 1, Calif.

November 4, 1948

Henry L. Hess, Esq.
U. S. Attorney,
506 U. S. Court House,
Portland, Oregon

No. 11963
U.S.A. vs. Herbert A. Jones, Jr.

Dear Mr. Hess :

In examining the copies of Brief for Appellant in above cause it is noted that your brief does not contain a specification relied upon as required by Subdivision 2 (d) of Rule 20.

Will you kindly have printed inserts for placing in your brief and serve copies upon all counsel promptly.

Sincerely,

PAUL P. O'BRIEN, *Clerk.*

O'B:C
cc-all counsel.

No. 11963

In the United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

HERBERT A. JONES, JR.,
Appellee.

On Appeal from the United States District Court
for the District of Oregon

REPLY BRIEF FOR APPELLANT

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No. 11963

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The appellee has attacked the Government's brief on the ground that it does not comply with Rule 20 (2) (a) in that the specifications of error are not set out with the proper particularity and in some instances omitted. While this rule has not been fully complied with, the QUESTIONS PRESENTED, SPECIFICATIONS OF ERRORS and the concise argument of the opening brief of the Government brings clearly to the Court's attention wherein the District Court erred. Although the Court has often severely criticized instances where specifications did not comply with the rule, nevertheless it has examined cases on their merits. *United States v. Cushman*, 136 Fed. 2d 815, 817; *Peck v. Shell Oil Company*, 142 Fed. 2d 141, 144.

Appellee has stated (Br. 17) that there is no specification bearing directly upon the point argued by the Government that the purported sale of these universal gear joints was void ab initio. He also expects the Government to reply to his contention that the Government is precluded from asking relief in this case because, so the appellee claims, there was compliance with Section 25 of the Surplus Property Act (50 U.S.C. App. Section 1634). The appellee has also raised the question of whether the Government is guilty of laches in bringing this suit. These matters are treated below.

There is proper specification in appellant's brief to support the argument that the purported sale was void ab initio.

Specification of Error 6 alleges: The District Court erred "in holding and concluding, if it so held and concluded, that the transaction between the defendant and the plaintiff's agents resulted in a valid sale."

A simple restatement of this assignment is that the Court erred in not holding that the sale of the universal gear joints was void ab initio.

It is therefore clear that the attack of the appellee that there was no specification directly bearing on this point is without foundation.

II

Government not precluded from relief by virtue of Section 25, Surplus Property Act.

Section 25 of the Surplus Property Act (50 U.S.C. App. Supp. V., Section 1634) provides a "bill of sale * * * executed by or on behalf of any Government agency purporting to transfer title or any other interest in property under this Act shall be conclusive evidence of compliance with the provision of this Act insofar as title or other interest of any bona fide purchaser for value, or lessee, as the case may be, is concerned."

The appellee quotes from House Report No. 1757, 78th Congress 2nd Session, page 17, where a statement of legislative intent is made concerning Section 25 of the Act, the purpose of this section is in the words of the report "These two provisions are designed clearly to assure to purchasers that *agencies* selling property of the government have full authority to do so, and that the purchaser's title cannot be invalidated because of the failure of a government *agency* to comply with a requirement of the Act." It should be noted that the lawmakers refer to compliance by an *agency*. It makes no reference as to individuals attempting to act for a government agency, but without authority, which is the case in this instance. The Act provides in Section 10 (a) (50 U.S.C. App. Supp. V, Section 1619a)

The Board shall designate one or more government agencies to act as disposal agencies under this Act. In exercising its authority to designate disposal agencies, the Board shall assign surplus property for disposal by the fewest number of government agencies practicable and, so far as it deems feasible, shall centralize in one disposal agency responsibility for the disposal of all property of the same type or class.

And again in Section 15 (50 U.S.C. App. Supp. V, Section 1624)

(a) Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any government *agency* is authorized to dispose of property under this Act, then the *agency* may dispose

of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the *agency* deems proper: * * *

(b) Any *owning agency* or *disposal agency* may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board.

Throughout the Act is reference to the owning agency and the disposal agency, which shows that the Congress intended when one agency disposed of property of another and gave a bill of sale as provided in Section 25 of the Act, that in that type of transaction instruments executed by a government agency are conclusive evidence of compliance with the provisions of the Act. All of the provisions in Sections 15 and 25 are to protect the purchaser from claims of one agency that another could not sell property owned by it. There is no indication in the Act itself, or in the committee report, that Congress ever intended that a person not properly authorized by law to act for the Government agency could execute an instrument and transfer title of Government property. As pointed out in the Government's opening brief at page 17, the law is firmly settled that the United States can be bound only by agents acting strictly within their authority and that persons dealing with agents

of the United States are charged with notice of limitation of the agent's authority. *Utah Power & Light Company v. United States*, 243 U. S. 389; *United States v. City and County of San Francisco*, 310 U. S. 16, 54 Am. Jur., U. S. Section 92. Had Congress intended to change this long-established rule, it surely would have made such change clear in the Act and would have mentioned the change in its report by more than stating that this section was to assure purchasers that the *agencies* selling the property have authority to do so. Section 25 of the Act applies only to disposition of property by agencies and not to disposition of property by unauthorized agents.

III

Government is not guilty of laches.

The appellee maintains in his brief (P. 53) that the government is guilty of laches in not bringing this suit until eleven months after the purported sale was consummated. That statutes of limitations in civil matters do not run against the United States is such a basic rule of law that no authorities need be cited. On the equity side of the court it is a well settled parallel rule that the government is not chargeable with laches. *Utah Power and Light Company v. United States*, 243 U. S. 389; 54 Am. Jur. 630, 631, *United States*, Secs. 123 and 124. There is in evidence in this case the pleadings in the state court in an action brought by

appellee Jones against C. T. Mudge, D. M. Gibson and S. M. Buffett as individuals. (Defendants' Exhibits 12(a) to (g)). The amended complaint shows the date of March 12, 1947, and thereafter counsel agreed to abate the action in the state court, pending an action to be filed where the government would be a party, which is this suit. (R. 138) This suit was filed in the Federal District Court in September, 1947. There is no basis for a defense of laches, even if it were chargeable to the United States.

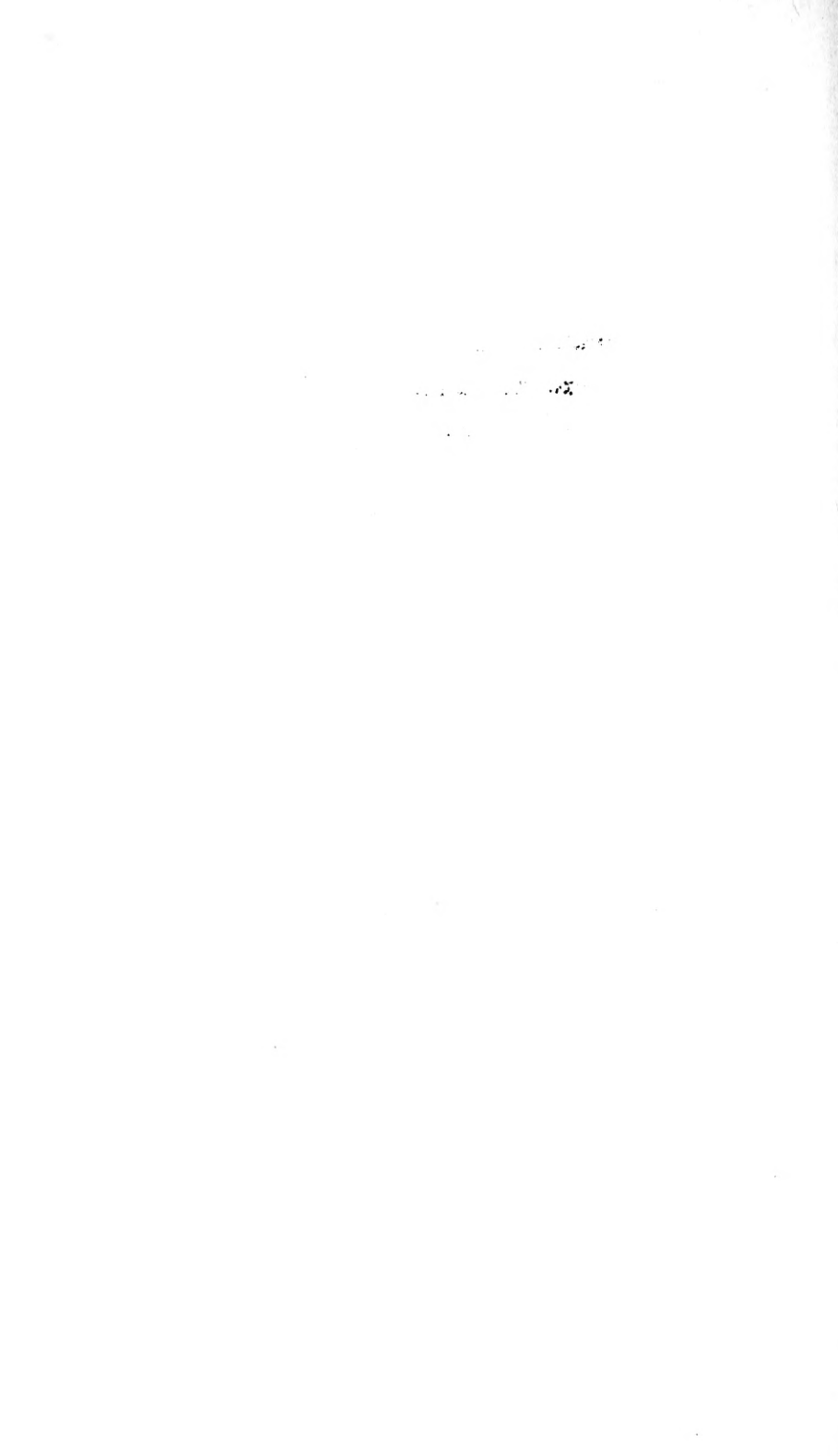
CONCLUSION

As supported by the above argument, it is submitted that there is proper specification of error as to the purported sale being void; Section 25 of the Surplus Property Act does not afford the appellee a defense against the established rule that all persons are charged with knowledge of authority of government agents; and the government is in no way chargeable with laches.

Respectfully submitted,

HENRY L. HESS,
United States Attorney.

VICTOR E. HARR,
GENE B. CONKLIN,
Assistant United States Attorneys.



No. 11964

United States
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FRANK L. CHRISTENSEN,

Appellant,

vs.

CHARLES LEE TROTTER and JOHN S.
RAYBURN,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

AUG 20 1948

PAUL P. O'BRIEN,

CLERK





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

STRUCKMEYER AND STRUCKMEYER,
207 Luhrs Building,
Phoenix, Arizona,
Attorneys for Appellant.

MORGAN AND LOCKLEAR,
Luhrs Building,
Phoenix, Arizona,
Attorneys for Appellee. [3*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Arizona

No. Civ. 111 Pret.

JOHN S. RAYBURN,

Plaintiff,

vs.

LIGHTNING DELIVERY COMPANY, a co-partnership; FRANK L. CHRISTENSEN, doing business as "LIGHTNING DELIVERY COMPANY"; P. J. FRANCIS, doing business as "LIGHTNING DELIVERY COMPANY"; FIRST DOE and SECOND DOE,

Defendants.

COMPLAINT FOR DAMAGES

Plaintiff complains of defendants and each of them and for cause of action alleges:

I.

That plaintiff is ignorant of the true names and capacities whether individual, corporate, associate or otherwise, of defendants First Doe and Second Doe and therefore sues said defendants by such fictitious names, and will pray leave of Court to amend this complaint to show their true names and capacities when same have been ascertained.

II.

That defendants and each of them are now, and were at all times herein mentioned, residents and citizens of the State of Arizona.

III.

That at all times herein mentioned plaintiff was and now is a resident and citizen of the State of California. [4]

IV.

That at all times herein mentioned defendant Frank L. Christensen was an individual doing business as Lightning Delivery Company in the State of Arizona.

V.

That at all times herein mentioned defendant P. J. Francis was an individual doing business as Lightning Delivery Company in the State of Arizona.

VI.

That the amount in controversy, exclusive of costs and interest, is in excess of the sum of Three Thousand (\$3,000.00) Dollars.

VII.

That on or about the 24th day of March, 1944, at or about the hour of 1:20 o'clock a.m. thereof, plaintiff was employed by The Atchison, Topeka and Santa Fe Railway Company as an engineer working on one of the locomotive engines of said The Atchison, Topeka and Santa Fe Railway Company which was then and there pulling a train over the mainline railroad tracks of said The Atchison, Topeka and Santa Fe Railway Company in a west-bound direction approximately opposite the station of The Atchison, Topeka and Santa Fe Railway Company at Kingman, Mojave County, Arizona.

VIII.

That at said time and place a certain truck owned by defendants and each of them and bearing the name Lightning Delivery was so carelessly and negligently parked by defendants on the roadway immediately above the said The Atchison, Topeka and Santa Fe Railway Company station at Kingman that it was suddenly caused to run away driverless and to run upon said roadway onto the said railroad tracks and to collide with the said locomotive engine, thereby directly and proximately causing said locomotive engine to become derailed and plaintiff thereby sustained the injuries [5] hereinafter enumerated: fractures of both wrists; contusions of the right hip; fracture of the greater trochanter of the right femur; multiple bruises and abrasions about the face, chest and right heel; extreme pain and suffering and a severe shock to his nervous system.

IX.

That at the time of the happening of the aforesaid accident plaintiff was a strong and able bodied man capable of earning and earning the sum of approximately Six Hundred (\$600.00) Dollars per month; that by reason of the facts hereinabove alleged and the injuries proximately caused plaintiff thereby, plaintiff is now, and will be for an indefinite period of time in the future, rendered incapable of performing his usual work or services or any work or services whatsoever, all to plaintiff's dam-

age in an amount as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of Court to insert said sum as the reasonable value of said loss of services. That the reasonable value of loss of wages is \$13,000.00.

X.

That as a direct and proximate result of the carelessness and negligence of defendants, as aforesaid, plaintiff has been generally damaged in the sum of Fifty Thousand (\$50,000.00) Dollars.

Wherefore, plaintiff prays judgment against defendants and each of them in the sum of Fifty Thousand (\$50,000.00) Dollars, together with such special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

J. H. MORGAN,
Attorney for Plaintiff.

HILDEBRAND, BILLS &
McLEOD,
Of Counsel.

[Endorsed]: Filed Sept. 14, 1944. [6]

In the District Court of the United States
for the District of Arizona

No. Civ. 112 Prc.

CHARLES LEE TROTTER,

Plaintiff,

vs.

LIGHTNING DELIVERY COMPANY, a co-part-
nership; FRANK L. CHRISTENSEN, doing
business as "LIGHTNING DELIVERY COM-
PANY"; P. J. FRANCIS, doing business as
"LIGHTNING DELIVERY COMPANY";
FIRST DOE and SECOND DOE,
Defendants.

COMPLAINT FOR DAMAGES

IX.

That at the time of the happening of the afore-
said accident plaintiff was a strong and able bodied
man capable of earning and earning the sum of
approximately Four Hundred, Fifty (\$450.00) Dol-
lars per month; that by reason of the facts herein-
above alleged and the injuries proximately caused
plaintiff thereby, plaintiff is now, and will be for
an indefinite period of time in the future, rendered
incapable of performing his usual work or services
or any work or services whatsoever, all to plaintiff's
damage in an amount as yet unascertainable, and
that when said sum is ascertained plaintiff will pray
leave of Court to insert said sum as the reasonable
value of said loss of services. That the reasonable
value of loss of wages is \$7,350.00.

X.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them, as aforesaid, plaintiff has been generally damaged in the sum of Thirty Thousand (\$30,000.00) Dollars.

Wherefore, Plaintiff prays judgment against defendants and each of them in the sum of Thirty Thousand (\$30,000.00) Dollars, together with such special damages as may be hereafter ascertained, and [9] for his costs of suit incurred herein.

J. H. MORGAN,

Attorney for Plaintiff.

HILDEBRAND, BILLS &

McLEOD,

Of Counsel.

[Endorsed]: Filed Sept. 14, 1944. [10]

[Title of District Court and Cause No. 111.]

ANSWER

Come now the defendants, Frank L. Christensen and P. J. Francis, and answering the complaint herein admit, deny, and allege:

I.

The defendants admit Paragraphs II, III, IV and VI of the complaint, and deny Paragraph V of the complaint.

II.

The defendants, further answering the complaint, allege that they have no knowledge of the facts stated in Paragraph VII of the complaint, and therefore neither admit nor deny the same.

III.

Defendants, further answering the complaint, deny Paragraphs VIII, IX and X of the complaint.

IV.

And the defendants, further answering the complaint and as an affirmative defense thereto, allege, that if [11] any such injuries were sustained by the plaintiff, such injuries were sustained by the plaintiff through his own negligence, which negligence proximately caused or proximately contributed to the sustaining of such injuries.

V.

Further answering the plaintiff's complaint and as an affirmative defense thereto, the defendants allege that the complaint fails to state facts sufficient upon which relief can be granted.

Wherefore, these defendants pray that the plaintiff take nothing by his complaint and for their costs herein sustained.

STRUCKMEYER &

STRUCKMEYER,

By F. C. STRUCKMEYER,

Attorneys for Defendants.

Service of this pleading made by depositing a copy in the United States Post Office, addressed to J. H. Morgan, attorney for the plaintiff, at Box 27, Prescott, Arizona, on the 29th day of September, 1944.

STRUCKMEYER &

STRUCKMEYER,

By F. C. STRUCKMEYER,

Attorneys for Defendants.

[Endorsed]: Filed Sept. 30, 1944. [12]

(Title of Court)

MINUTE ENTRY OF THURSDAY, JULY
19, 1945

(Prescott Division)

March 1945 Term, at Prescott.

Honorable Albert M. Sames, United States District Judge, presiding.

[Title of Causes No. 111, 112]

E. C. Locklear, Esquire, is present on behalf of the plaintiff. James A. Struckmeyer, Esquire, is present on behalf of the defendants.

E. C. Locklear, Esquire, moves to permit the plaintiff to amend his complaint by adding the words, "and citizen" in line 32 on page 1 thereof after the word, "resident", and by adding the words, "and citizens" after the word, "residents" in line 29 on said page 1. Counsel for the defendants objects to said amendment, and

It is ordered that said amendment be and it is allowed, and

It is further ordered that the Clerk make such amendment by interlineation.

Said counsel now stipulate that this case may be transferred to the Phoenix calendar and that this case may be tried at Phoenix, Arizona, and

It is ordered that this case be and it is transferred to the Phoenix calendar for trial setting.

Said counsel now stipulate that the trial hereof shall be before a Jury. [17]

(Title of Court)

MINUTE ENTRY OF MONDAY,
OCTOBER 8, 1945

(Prescott Division)

October 1945 Term, at Phoenix.

Honorable Dave W. Ling, United States District
Judge, presiding.

CIV-111

JOHN S. RAYBURN,

Plaintiff,

vs.

LIGHTNING DELIVERY COMPANY, et al.,
Defendants.

CIV-112

CHARLES LEE TROTTER,

Plaintiff,

vs.

LIGHTNING DELIVERY COMPANY, et al.,
Defendant.

CIV-115

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,
Plaintiff,

vs.

FRANK L. CHRISTENSEN, etc.,

Defendant.

David Jones, Esquire, is present on behalf of
the plaintiff, and states he is to be associated with

counsel for plaintiff herein; and that remaining counsel for the respective parties herein have consented to a consolidation of the cases, Civil-111 Prescott, Civil-112 Prescott and Civ-115 Prescott for trial before a Jury in January of 1946.

It is ordered that these cases be and they are consolidated for trial before a Jury and

It is further ordered that these cases be and they are set for trial on Tuesday, January 15, 1946, at the hour of ten o'clock a.m., at Phoenix, Arizona.

(Title of Court)

MINUTE ENTRY OF TUESDAY,
DECEMBER 30, 1947

(Prescott Division)

October 1947 term, at Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Causes No. 111, 112.]

This case comes on regularly for trial this day. The parties herein are present with their counsel. Joseph H. Morgan, Esquire, and Donald Morgan, Esquire, appear as counsel for the plaintiff. F. C. Struckmeyer, Esquire, and James Struckmeyer, Esquire, appear as counsel for the defendants. Louis L. Billar is present as official court reporter.

On motion of Joseph H. Morgan, Esquire,

It is ordered that E. W. Brobst, Esquire, be en-

tered as associate counsel for the plaintiffs, and be admitted specially to practice herein.

There being but twenty-three jurors in attendance, counsel for the defendants waives one peremptory challenge. Examination of jurors on voir dire is now had and Arthur H. Brooks is excused for cause. Counsel for the plaintiffs waives one peremptory challenge.

A lawful jury of twelve men is now duly empaneled and sworn to try this case.

Thereupon, it is ordered that all Jurors not empaneled in the trial of this case be excused until further order.

Counsel for the plaintiffs now reads the complaints to the jury and counsel for the defendants now reads the answers to the jury.

PLAINTIFFS' CASE

Dewey A. Pennington is now sworn and examined on behalf of the plaintiffs.

Frank L. Christensen is now sworn and cross-examined under statute.

On motion of Joseph H. Morgan, Esquire,

It is ordered that each of these cases be and they are dismissed as to all defendants except Frank L. Christensen doing business as Lightning Delivery Company.

The following plaintiff's witnesses are now sworn and examined: Thomas W. Atkins, Sam Marbell.

Plaintiffs' exhibits 1, 4, 5 and 6, each a photograph, are now admitted in evidence. [23]

And thereupon, at the hour of twelve o'clock

noon, it is ordered that the further trial of this case be continued until two o'clock p.m., this date, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of two o'clock p.m., the Jury and all members thereof, the parties and counsel for respective parties being present pursuant to recess further proceedings of trial are had as follows:

PLAINTIFFS' CASE CONTINUED

Charles Lee Trotter is now sworn and examined in his own behalf.

Counsel for the defendant makes offer of proof and defendant's Exhibit A is marked for identification. Counsel for the plaintiffs objects thereto, and

It is ordered that said objection be and it is sustained.

John S. Rayburn is now sworn and examined in his own behalf.

Counsel for the defendant offers Defendant's Exhibit B in evidence. Counsel for plaintiffs objects thereto, and

It is ordered that said objection be and it is sustained.

Joseph H. Morgan, Esquire, now moves to amend complaint in Civ-112 by interlineation in paragraph 9 by adding "\$450.00 per month" in lieu of \$225.00 to conform with proof and by adding "That the

reasonable value of loss of wages is \$7,350.00”; and further moves for leave to amend complaint in Civ-111 by interlineation of paragraph 9, by adding “approximately \$600” in lieu of \$500.00, to conform with proof and by adding “That the reasonable value of loss of wages is \$13,000.00”, and

It is ordered that said Motions for leave to amend Complaint be and they are granted.

The deposition of Dr. Ivo J. Lopizich is now admitted and read in evidence.

Whereupon the plaintiffs rest.

Counsel for the defendant now moves to dismiss on account of insufficient evidence, and

It is ordered that said Motion to Dismiss be and it is denied.

DEFENDANT'S CASE

Charles Dryden is now sworn and examined on behalf of the defendant.

Defendant's exhibit C, map, is now admitted in evidence.

And thereupon, at the hour of 4:25 o'clock p.m., it is ordered that [24] the further trial of this case be continued until ten o'clock a.m., Wednesday, December 31, 1947, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused. [25]

(Title of Court)

MINUTE ENTRY OF WEDNESDAY,
DECEMBER 31, 1947

(Prescott Division)

October 1947 Term, at Phoenix.

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Causes No. 111, 112.]

The jury, and all members thereof, the parties
and counsel are present pursuant to recess and fur-
ther proceedings of trial are had as follows:

DEFENDANT'S CASE CONTINUED

Conda E. Wilson is now sworn and examined on
behalf of the defendant.

Frank L. Christensen, heretofore sworn, is now
called and examined in his own behalf.

Plaintiffs' exhibit 9, photograph, is now admitted
in evidence.

The following defendant's witnesses are now
sworn and examined: Leonard J. Gore, Elmer Hub-
bard, Sidney Fisher.

Portions of depositions of Charles Lee Trotter
and John S. Rayburn are now read in evidence.

Counsel for defendant now renews offer of de-
fendant's exhibits A and B for identification, in
evidence, and

It is ordered that plaintiffs' objection be and it
is sustained.

And the defendant rests.

REBUTTAL

John S. Rayburn is now recalled and further examined in his own behalf.

Sam Marbell is now recalled and further examined on behalf of the plaintiffs.

Both sides rest.

And thereupon, at the hour of 11:50 o'clock a.m., it is ordered that the further trial of this case be continued until ten o'clock a.m., Friday, January 2, 1948, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused. [26]

(Title of Court)

MINUTE ENTRY OF FRIDAY,
JANUARY 2, 1948

(Prescott Division)

October 1947 Term, at Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Causes No. 111, 112.]

The jury, and all members thereof, the parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Counsel for the defendant now moves for directed verdict, and

It is ordered that said Motion be and it is denied.

All the evidence being in, the case is argued by respective counsel to the jury.

And thereupon, at the hour of 12:00 o'clock noon,

it is ordered that the further trial of this case be continued to the hour of two o'clock p.m., this date, to which time the jury, being first duly admonished, the parties and counsel are excused.

Subsequently, at the hour of two o'clock p.m., the jury and all members thereof, the parties and their respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

The case is now further argued by counsel for the plaintiff to the jury.

Whereupon, the Court duly instructs the jury and said jury retire at the hour of 2:45 o'clock p.m. in charge of a sworn bailiff to consider of their verdicts. Counsel for defendants object to the court's giving of plaintiffs' requested instructions 5, 6 and 8 and to the court's refusal to give defendant's requested instruction No. 2.

Subsequently, the parties and counsel being present, the Jury return in a body into open Court at the hour of 4:15 o'clock p.m., and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon the Foreman reports that they have agreed and presents the following verdicts, to-wit:

Civ-111 Prescott

JOHN S. RAYBURN,

Plaintiff,

Against

FRANK L. CHRISTENSEN, doing business as
"Lightning Delivery Company,"

Defendant,

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff, John S. Rayburn, and assess his damages at \$1,000.00.

W. H. GREEN,
Foreman. [27]

Civ-112 Prescott

CHARLES LEE TROTTER,

Plaintiff,

Against

FRANK L. CHRISTENSEN, doing business as
“Lightning Delivery Company,”

Defendant,

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths do find for the plaintiff, Charles Lee Trotter, and assess his damages at \$7,500.00.

W. H. GREEN,
Foreman.

The verdicts are read as recorded and the jury is discharged from the further consideration of this case and until further order.

It is ordered that plaintiffs have judgment on the verdicts. [28]

[Title of District Court and Causes No. 111, 112]

CONSOLIDATED FOR TRIAL
DEFENDANT'S REQUESTED
INSTRUCTIONS

Comes now the defendant, by his attorneys of record, and moves the court to instruct the jury as follows:

STRUCKMEYER &
STRUCKMEYER,

By

Attorneys for Defendant. [29]

D-I.

You are instructed to return a verdict in favor of the defendant.

Given.....

Refused: Dave W. Ling.

Given as modified.....

D-II.

You are instructed that the law presumes that the driver of an automobile was operating the automobile legally and lawfully. The fact of an accident is in itself no proof of negligence and in the absence of evidence to the contrary you must presume that the defendant here was free from negligence. The burden of proof is upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent in the manner alleged in the complaint, and unless you believe from a preponderance of the evidence that the defendant

was negligent in the manner alleged, then you must return a verdict in favor of the defendant.

Given

Refused: Dave W. Ling.

Given as modified [30]

D-III.

If you believe that from the evidence that the driver of the truck in question exercised ordinary and reasonable care in parking the truck and that he took such steps as an ordinary and reasonably prudent person would take to safe guard the said truck against moving, then in that event you shall return a verdict for the defendants.

Given: Dave W. Ling.

Refused

Given as modified

D-IV.

I further charge you that if the defendant, acting through the driver of his truck, exercised reasonable and ordinary care as I heretofore defined to you, in the parking of the truck, and though said truck thereafter, through external cause not shown by the evidence, came to rest on the track of the Santa Fe Railway Company, then it is your duty to find a verdict for the defendant. In other words, it is not the duty of the defendants to explain or show the reason why their truck came upon the track of the Santa Fe Railways Company, but it is the duty of the plaintiffs to prove by a preponderance of the evidence that said truck came upon the

track of the Santa Fe Railway Company through the negligence of the defendant.

Given: Dave W. Ling.

Refused

Given as modified

[Endorsed]: Filed Jan. 2, 1948. [31]

(Title of Court)

MINUTE ENTRY OF TUESDAY,
JANUARY 6, 1948
(Prescott Division)

October 1947 Term, at Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Cause No. 111.]

It is ordered that the form of judgment presented by Joseph Morgan, Esquire, counsel for the plaintiff, approved as to form by counsel for the defendant be approved, entered, filed and spread upon the minutes as the judgment herein as follows:

CIV-111

JOHN S. RAYBURN,

Plaintiff,

vs.

FRANK L. CHRISTENSEN, doing business as
"LIGHTNING DELIVERY COMPANY,"
Defendant.

JUDGMENT

This action came on regularly for trial on Decem-

ber 30, 1947. The parties appeared by their attorneys, Messrs. J. H. Morgan, D. J. Morgan and D. W. Brobst, counsel for the plaintiff, Messrs. F. C. Struckmeyer and James A. Struckmeyer, for defendant. A jury of twelve persons was regularly impaneled and sworn to try the action. Witnesses on the part of plaintiff and defendant were sworn and examined. The trial continued on the 31st day of December, 1947. After hearing the evidence, the arguments of counsel and instructions of the Court on January 2, 1948, the jury retired to consider their verdict, and on said day returned into court, and rendered their verdict in favor of plaintiff and against the defendant for Ten Thousand Dollars (\$10,000.00). Thereupon, the Court ordered judgment in accordance with said verdict, together with costs, to be entered on formal written judgment.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said John S. Rayburn, plaintiff, have and recover from said Frank L. Christensen, defendant, the said sum of Ten Thousand Dollars (\$10,000.00), together with the costs and disbursements of this [32] action, taxed and allowed at the sum of One Hundred Fifty-five and 73/100----- Dollars (\$153.73), with interest on the amounts so

recovered at the rate of six per cent (6%) per annum from this date until paid.

Dated this 6th day of January, 1948.

Approved as to form January .., 1948.

STRUCKMEYER &
STRUCKMEYER,

By James A. STRUCKMEYER,
Attorneys for Defendant.

or

Service accepted this day of January, 1948.

STRUCKMEYER &
STRUCKMEYER,

By
Attorneys for Defendant.

The foregoing form of judgment is hereby approved, and the Clerk directed to enter the same.

Dated January 6, 1948.

DAVE W. LING,
District Judge.

[Endorsed]: Filed and entered in Civil Docket
Jan. 6, 1948, Wm. H. Loveless, Clerk.

[Title of Cause No. 112.]

It is ordered that the form of judgment presented by Joseph Morgan, Esquire, counsel for the plaintiff, and approved as to form by counsel for the

defendant be approved, entered, filed and spread upon the minutes as the judgment herein as follows:

CIV-112

CHARLES LEE TROTTER,

Plaintiff,

vs.

FRANK L. CHRISTENSEN, doing business as
"LIGHTNING DELIVERY COMPANY,"

Defendant.

JUDGMENT

This action came on regularly for trial on December 30, 1947. The parties appeared by their attorneys, Messrs. J. H. Morgan, D. J. Morgan and D. W. Brobst, counsel for the plaintiff, Messrs. F. C. Struckmeyer and James A. Struckmeyer, for defendant. A jury of twelve persons was regularly impaneled and sworn to try the action. Witnesses on the part of plaintiff and defendant were sworn and examined. The trial continued on the 31st day of [33] December, 1947. After hearing the evidence, the arguments of counsel and instructions of the Court on January 2, 1948, the jury retired to consider their verdict, and on said day returned into court, and rendered their verdict in favor of plaintiff and against the defendant for Seven Thousand Five Hundred Dollars (\$7,500.00). Thereupon, the Court ordered judgment in accordance with said verdict, together with costs, to be entered on formal written judgment.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said Charles Lee Trotter, plaintiff, have and recover from said Frank L. Christensen, defendant, the said sum of Seven Thousand Five Hundred Dollars (\$7,500.00), together with the costs and disbursements of this action, taxed and allowed at the sum of One Hundred Fifty-two and 17/100 Dollars (\$152.17), with interest on the amounts so recovered at the rate of six per cent (6%) per annum from this date until paid.

Dated this 6th day of January, 1948.

Approved as to form January, 1948.

STRUCKMEYER &
STRUCKMEYER,

By JAMES A. STRUCKMEYER,
Attorneys for Defendant.

Service accepted this day of January, 1948.

STRUCKMEYER &
STRUCKMEYER,

By
Attorneys for Defendant.

The foregoing form of judgment is hereby approved, and the Clerk directed to enter the same.

Dated January 6, 1948.

DAVE W. LING,
District Judge.

[Endorsed]: Filed and entered in Civil Docket
Jan. 6, 1948, Wm. H. Loveless, Clerk.[34]

[Title of District Court and Cause No. 111.]

CIVIL DOCKET

Proceedings

Date

1948

Jan. 6-16—Enter and file and docket judgment for pltf. against deft. Frank L. Christensen in the sum of \$10,000.00 plus costs in sum of \$155.73; and int. on amounts recovered at rate of 6% per annum from 1/6/48 until paid.

[Title of Cause No. 112.]

CIVIL DOCKET

Proceedings

1948

Date

Jan. 6-16—Enter and file and docket judgment for pltf. against deft. Frank L. Christensen in sum of \$7,500.00 plus costs in sum \$152.17; and int. on amounts recovered at rate of 6% per annum until paid.

[Title of District Court and Cause No. 111.]

MOTION FOR NEW TRIAL

Comes Now the defendant and moves the court that a new trial be granted as to the issues in the

above entitled and numbered cause upon the following grounds and for the following reasons:

1. The court erred prejudicially in refusing to admit defendant's Exhibit "A" marked for identification.

2. The court erred prejudicially in giving of certain instructions over the objections of the defendant.

3. The court erred in instructing the jury that the jury must apply the so-called "res ipsa loquitur" doctrine, and in submitting the matter to the jury on the said doctrine.

4. The court erred prejudicially in denying the defendant's motion for a directed verdict made at the close of the plaintiff's case and renewed at the close of all the evidence.

Wherefore, the defendant prays the foregoing motion be granted.

STRUCKMEYER &
STRUCKMEYER,

By JAMES A. STRUCKMEYER,
Attorneys for Defendant. [40]





[Title of District Court and Cause No. 111.]

MOTION FOR JUDGMENT

Comes now the defendant in the above entitled matter and cause, and moves that the court do make and enter its order setting aside the judgment herein and granting judgment in favor of defendant notwithstanding the verdict of the jury on the ground and for the reason that the evidence adduced by the plaintiff does not show any negligence upon the part of the defendant which proximately caused the injury of which the plaintiff complains.

Wherefore, defendant prays the foregoing motion be granted.

STRUCKMEYER &
STRUCKMEYER,

By JAMES A. STRUCKMEYER,
Attorneys for Defendant.

Received copy this 12th day of January, 1948.

MORGAN & LOCKLEAR,

By J. H. MORGAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 12, 1948. [43]

[Title of Court.]

MINUTE ENTRY OF
MONDAY, MARCH 15, 1948

(Prescott Division)

October 1947 Term. At Phoenix.

[Titles of Causes Nos. 111, 112.]

Motion of the defendant Frank L. Christensen for New Trial and Motion for Judgment come on regularly for hearing this date. J. H. Morgan, Esquire, appears for the plaintiff. Fred C. Struckmeyer, Esquire, and James Struckmeyer, Esquire, appear for the defendant.

On motion of counsel for the defendant,

It Is Ordered that the defendant be allowed to amend Motion for New Trial by attaching thereto a photostatic copy of blackboard diagram made during the trial. Said Motions are argued and submitted.

It Is Ordered that the defendant be allowed twenty days within which to file Memorandum and the plaintiff five days thereafter within which to answer. [48]

[Title of Court.]

MINUTE ENTRY OF
WEDNESDAY, MAY 5, 1948

(Prescott Division)

April 1948 Term. At Phoenix.

Honorable Dave W. Ling, United States District
Judge, presiding.

[Titles of Causes Nos. 111, 112.]

Defendant's Motion for New Trial and Motion
for Judgment having been heretofore argued and
submitted,

It Is Ordered that said Motion for New Trial
and Motion for Judgment be and they are denied.

(Notation of order entered in Civil Docket May
5, 1948.) [49]

[Title of District Court and Causes Nos. 111, 112.]

STIPULATION

It Is Stipulated that the above entitled actions
may be consolidated for purposes of appeal.

MORGAN & LOCKLEAR,

By J. H. MORGAN,

Attorneys for Plaintiffs.

STRUCKMEYER &

STRUCKMEYER,

By JAMES A. STRUCKMEYER,

Attorneys for Defendant.

[Endorsed]: Filed May 25, 1948. [50]

[Title of District Court and Causes Nos. 111, 112.]

NOTICE OF APPEAL

Notice is hereby given that Frank L. Christensen, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 6th day of January, 1948, and from the order of the 5th day of May, 1948, denying defendant's Motion for a New Trial and Motion for Judgment notwithstanding the Verdict.

STRUCKMEYER &
STRUCKMEYER,

By /s/ JAMES A. STRUCKMEYER,
Attorneys for Appellant
Frank L. Christensen.

[Endorsed]: Filed May 25, 1948. [51]

[Title of Court.]

MINUTE ENTRY OF
THURSDAY, MAY 27, 1948
(Prescott Division)

April 1948 Term. At Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Causes Nos. 111, 112.]

It Is Ordered that Appellant's Supersedeas Bond on Appeal, with American Surety Company as surety thereon, be and it is approved. [56]

[Title of District Court and Causes Nos. 111, 112.]

ORDER FOR TRANSMITTAL OF CERTAIN
ORIGINAL EXHIBITS AND REPORTER'S
TRANSCRIPT TO CIRCUIT COURT OF
APPEALS

Counsel for the appellants having designated that all exhibits introduced in evidence or marked for identification herein, including the photograph of blackboard on which various witnesses diagrammed the scene of the accident, be contained in the transcript of record on appeal herein, and it appearing to the Court that the photograph of blackboard diagram is included in the record on appeal herein as a part of the defendant's motion for new trial herein,

It Is Ordered that the Clerk of this Court transmit the following original exhibits herein to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record on appeal in these cases:

Plaintiff's Exhibit 1—photograph (in evidence).
Plaintiff's Exhibit 4—photograph (in evidence).
Plaintiff's Exhibit 5—photograph (in evidence).
Plaintiff's Exhibit 6—photograph (in evidence).
Plaintiff's Exhibit 9—photograph (in evidence).
Defendant's Exhibit A—Certified copy of Complaint (marked for identification).

Defendant's Exhibit B—Certified copy of Complaint (marked for identification).

Defendant's Exhibit C—Map (in evidence).

It Is Further Ordered that the original of Reporter's Transcript herein be transmitted to said circuit court of appeals as a part of the record on appeal herein.

Dated at Phoenix, Arizona, this 28th day of June, 1948.

DAVE W. LING,
United States District Judge.

[Endorsed:] Filed June 28, 1948. [57]

[Title of District Court and Causes Nos. 111, 112.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes now Frank L. Christensen and hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Complaint, Civil Cause No. 111 Pct.
2. Complaint, Civil Cause No. 112 Pct. abbreviated by omission of allegations duplicitous to those of Civil Cause No. 111. (Included: Paragraphs IX, X and prayer.)
3. Answer of defendant Frank L. Christensen, Civil Cause No. 111. (Note: Answer in Civil Cause No. 112 omitted as duplicitous.)
4. Requested instructions by defendant.
5. Judgment in Civil Cause No. 111.

6. Judgment in Civil Cause No. 112 abbreviated by omission of duplicitous items.

7. Motion for New Trial in Civil Cause No. 111. (Note: Motion for New Trial in Civil Cause No. 112 omitted as duplicitas.)

8. Motion for Judgment notwithstanding the Verdict in Civil Cause No. 111. (Note: Motion for Judgment notwithstanding the Verdict in Civil Cause No. 112 omitted as duplicitous.)

9. All Minute Entries and Orders.

10. All Exhibits marked for identification or introduced into evidence including photograph of blackboard on which various witnesses diagrammed the scene of the accident.

11. Notice of appeal.

12. Stipulation of consolidation of Civil Causes Nos. 111 and 112.

13. Supersedeas Bond on Appeal in Civil Causes Nos. 111 and 112.

14. Reporter's Transcript, including charge to jury.

15. Designation of Contents of Record on Appeal.

Defendant Frank L. Christensen requests that the foregoing portions of the record be forwarded

to the United States Circuit Court of Appeals for the Ninth Circuit as required by law.

Dated this 4th day of June, 1948.

STRUCKMEYER &
STRUCKMEYER,

By F. C. STRUCKMEYER,
Attorneys for Frank L. Christensen.

Received copy of the foregoing designation this 4th day of June, 1948.

MORGAN & LOCKLEAR,

By J. H. MORGAN,
Attorneys for Plaintiffs.

Approved:

MORGAN & LOCKLEAR,
By J. H. MORGAN,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 4, 1948. [59]

CLERK'S CERTIFICATE

United States of America,
District of Arizona—ss.

..

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of John S. Rayburn, Plaintiff, vs. Frank L. Christen-

sen, et al., Defendants, numbered Civ.-111 Prescott, on the docket of said Court, and Charles Lee Trotter, Plaintiff, vs. Frank L. Christensen, et al., Defendants, numbered Civ.-112 Prescott, on the docket of said Court.

I further certify that the attached pages numbered 1 to 59, inclusive, contain a full, true and correct transcript of the proceedings of said causes and all the papers filed therein, together with the endorsement of filing thereon, called for and designated in the Designation filed in each of said causes and made a part of the transcript attached hereto, as the same appear from the originals of record on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid, with the exception of the Reporter's Transcript, Plaintiff's Exhibits 1, 4, 5, 6 and 9, and Defendant's Exhibits A, B and C, the originals of which are transmitted herewith pursuant to order of the Court and made a part of this record on appeal.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$16.20 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 30th day of June, 1948.

[Seal] /s/ WM. H. LOVELESS,
Clerk. [60]

In the District Court of the United States
for the District of Arizona

No. Civil 111 Prescott

JOHN S. RAYBURN,

Plaintiff,

vs.

FRANK L. CHRISTENSEN, et al.,

Defendants.

No. Civil 112 Prescott

CHARLES LEE TROTTER,

Plaintiff,

vs.

FRANK L. CHRISTENSEN, et al.,

Defendants.

REPORTER'S TRANSCRIPT

The above entitled and numbered causes came on duly and regularly to be heard before the Honorable Dave W. Ling, Judge, presiding with a jury, at Phoenix, Arizona, commencing at the hour of 10:00 o'clock, a.m., on the 30th day of December, 1947.

The plaintiffs were represented by J. H. Morgan and Don Morgan, of Phoenix, Arizona, and B. W. Brobst, of Oakland, California.

The defendant was represented by Fred C. Struckmeyer, Sr., and James A. Struckmeyer.

The following proceedings were had: [1*]

The Clerk: Civil 111, Prescott, John S. Ray-

*Page numbering appearing at foot of page of original certified Transcript of Record.

burn, Plaintiff, versus Lightning Delivery Company, et al, and 112, Prescott, Charles Lee Trotter, Plaintiff, versus Lightning Delivery Company, et al, for trial.

The Court: Are you ready?

Mr. James Struckmeyer: The plaintiffs are ready, your Honor.

Mr. Morgan: The defendants are ready.

The Court: Has there been an order consolidating each case for trial?

The Clerk: Yes, your Honor. The third case has been settled, it has been vacated. That is the Santa Fe.

The Court: I understood that that was to be settled. You don't need to call that.

Mr. Morgan: At this time, if the Court please, I wish to move special counsel in this case, Mr. B. W. Brobst, of Oakland, California.

The Court: All right.

The Clerk: Shall I call 18 names, your Honor?

The Court: No, I think each side would be entitled to three challenges in each case. You had better call 24.

(Thereupon 23 jurors were called.)

The Clerk: That is 23 jurors, your Honor. [2]

The Court: You don't have 24 here this morning?

The Clerk: No, we notified 24 to be here, but one of them was excused.

The Court: Well, are you gentlemen willing to waive your challenges, either of you?

Mr. Morgan: Well, of course, we represent two

plaintiffs, the defendants represent one defendant. We think they should be willing to waive and take five.

The Court: Do you want to waive your challenges?

Mr. James Struckmeyer: Well, we will waive a challenge.

The Court: All right. There are two cases, ladies and gentlemen of the jury, upon which you will be asked to qualify this morning. One is Charles Lee Trotter against the Lightning Delivery Company, a copartnership, and Frank L. Christensen, doing business as the Lightning Delivery Company; P. J. Francis, doing business as the Lightning Delivery Company, and the other is John R. Rayburn against the same defendants. These complaints allege that Trotter was a fireman on the Santa Fe Railroad, and Rayburn was the engineer; that, at the Town of Kingman, in March of 1944, a truck [3] of the defendant was parked beside the railroad track, and in some manner, as I understand from the pleadings, was unattended at the time and it got loose and ran into the engine and derailed it and injured these plaintiffs, and these two actions are to recover damages for injuries which they claim they received at that particular time.

(Thereupon the jurors were examined on their voir dire by Court and counsel, after which 12 jurors were selected to act as jurors throughout the trial, after being first duly sworn.)

The Court: You may read your pleadings.

Mr. Morgan: Your Honor please, we are willing to waive the reading of the pleadings, if it is satisfactory.

The Court: All right. Do you want to make an opening statement?

Mr. F. C. Struckmeyer: I think the pleadings should be read so the jury will understand it.

Mr. Morgan: Very well. Gentlemen of the jury, these actions are both supported by means of complaints which I shall read to you.

(Thereupon the pleadings and the answers in both cases were read to the jury.)

Mr. Don Morgan: Now, if your Honor please, I would like to make a short statement of the case [4] to clarify the minds of the Court and jury, because the pleadings don't do that.

These cases grew out of an accident, gentlemen, on the morning of March 24th, about 1:20 o'clock, a.m., at Kingman, Arizona. The defendant was engaged as a contract or common carrier operating trucks for the carriage of livestock and other commodities in Arizona. He was the sole owner of the Lightning Delivery Company. On the morning of March 24th, or in that connection, gentlemen, the defendant, Frank L. Christensen, since the time of filing these complaints, we ascertained that Mr. Francis was not a member or owner of the Company at the time of this accident. Mr. Frank L. Christensen is the only defendant as sole owner of the Lightning Delivery Company at the time the accident occurred.

On the morning of March 24th, 1944, some time

before 1:20 a.m., his driver, C. E. Wilson, who was operating a 1940 Ford truck and semi-trailer on Company business, parked it near what was then known as Peggy's Cafe, on the north side of Highway 66, which parallels the Santa Fe westbound track. The truck was parked on a downgrade. This grade sloped west and south toward the Santa Fe tracks. [5]

At about 1:20 the second section of Santa Fe's No. 3 westbound passenger train, with two engines, was pulling into Kingman at a point a short distance of the Kingman Station, collided with defendant's truck, which had rolled down the slope, crossed the highway, and had come to rest across the tracks on which the second section of Train No. 3 was moving westward. The truck was driverless, was headed south across the track. The train's brakes were applied, but the train could not be stopped before the impact. The collision resulted in the derailment of the second engine, of which Rayburn was the engineer and Trotter the fireman. Both men were seriously injured. They have brought separate suits against the defendant upon the ground that the truck was parked in such a manner as to permit it to run away on the roadway where it was parked, and upon the said Santa Fe tracks, with the resulting collision and derailment of the second locomotive upon which plaintiffs were riding, and employed.

Since the basic facts apply to both cases, they have been consolidated for trial. All of the evidence which we expect to introduce will apply to

both cases, except the testimony as to the character and the extent of the injuries [6] suffered by each of the plaintiffs.

We will show, in presenting this cause, we will prove the facts which have been related, and will show to you that the negligent parking of the truck and semi-trailer on the grade mentioned was the direct and proximate cause of the collision, derailment of the engine, and the injuries suffered by the plaintiffs.

Now, with respect to Plaintiff Rayburn, we will show that at the time of the accident he was aged 47 years, and was in good health. We will prove that he was thrown from the cab of the engine a distance of approximately 15 feet, was rendered unconscious for a few moments, that he fell face downward on head and hands, that both his wrists were fractured. He received bone and muscle bruises on the right hip and on other portions of the right side of his body. He sustained multiple bruises and contusions above and below the right eye.

We will prove his hospitalization at Kingman and at the Santa Fe Hospital in Los Angeles, and show the treatment that was given to him over a long period of time, both in connection with the broken wrists and the injuries to his face. The testimony will show that he suffered and is [7] still suffering great pain and anguish because of these injuries, and that he was unable to return to work until February 1st, 1945.

He was earning at the time of his accident the

sum of \$600 per month, and for loss of time alone was damaged to the extent of over \$5000.

Our testimony will show that Mr. Trotter was a fireman on the second engine of No. 3, that he had been employed by the Santa Fe Railway for three years prior to the accident, and at that time he was 40 years of age. By the collision or derailment, he was knocked or thrown down between the tank and cab of the engine, where he was pinned for some time. His back was badly hurt and his right leg and left side were injured. He received hospital treatment and medical treatment over a considerable period of time, also was hospitalized twice at the Santa Fe Hospital in Los Angeles, and by reason of his injuries, was unable to return to work until February 9th, 1945. He was making \$450 per month at the time of the accident, and his damages for loss of time alone amount to around \$5000. His injuries were generally diagnosed as a low severe back strain or sprain, the indications being that the severe sprain of the lumbosacral region developed [8] irritation of the nerves, including the sciatic nerve on the right side, also he sustained contusions in the region of the left ribs, right thigh and right hip, and muscle strain of the low back and abdomen. For a long period he suffered intense pain because of these injuries, and is still suffering from pain and disability, particularly in the right leg.

When we have made this proof and this case is submitted to you, we expect a verdict for substantial damages on behalf of both of the plaintiffs.

Mr. Struckmeyer: May we reserve our opening statement?

The Court: Yes. Call your first witness.

Mr. J. H. Morgan: Mr. D. A. Pennington.

DEWEY A. PENNINGTON

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Morgan:

Q. For the record, will you give your name?

A. Dewey A. Pennington.

Q. Where do you reside, Mr. Pennington? [9]

A. Needles, California.

Q. Are you connected in any way with the Santa Fe Railroad Company? A. Yes, sir.

Q. In what capacity? A. Conductor.

Q. Conductor at the present time. How long have you been in the employ of the Santa Fe?

A. Seven years.

Q. In March of 1944, were you working for the Santa Fe? A. Yes.

Q. Directing your attention particularly to the 24th day of March, 1944, in Kingman, Arizona, were you at that time employed by the Santa Fe?

A. I was flagging on a passenger at that time.

Q. What passenger train were you on?

A. No. 3.

Q. Sir? A. No. 3.

Q. I can't hear you.

A. No. 3. I have asthma, I don't talk very loud.

Q. Were you on No. 3 or No. 1? A. No. 1.

(Testimony of Dewey A. Pennington.)

Q. Well, do you recall the morning, the early morning of March 24th, 1944?

A. How is that again?

Q. Do you recall the early morning of March 24th, 1944? A. Yes, sir.

Q. Particularly the time when one of the Santa Fe trains was derailed at Kingman?

A. We stopped at Kingman as the head of that train was derailed.

Q. You will have to speak a little louder, or maybe you have some trouble, I think, with your voice. A. I have asthma.

Q. You were on No. 1, you say?

A. Yes, sir.

Q. What time did No. 1 pull into Kingman?

A. About 1:00 o'clock.

Q. In what direction was No. 1 going?

A. West.

Q. You were being followed by what train?

A. No. 3.

Q. Do you recall whether it was the first or second section of No. 3? A. I don't remember.

Q. One of the sections of No. 3?

A. Yes. [11]

Q. No. 1 is a passenger train? A. Yes, sir.

Q. No. 3 a passenger train? A. Yes, sir.

Q. How long did you stay in Kingman?

A. About ten minutes.

Q. What was your duty at that time?

A. Flagging.

Q. Flagging the rear or front?

(Testimony of Dewey A. Pennington.)

A. The rear. We don't flag in front.

Q. I see, I didn't know. What did you do then when your train pulled into Kingman?

A. I went back about, probably a quarter of a mile or less.

Q. As I understand it, then, when No. 1 pulled into the station you went back to flag?

A. Yes, sir.

Q. In flagging, what are you supposed to do?

A. Go back there and stand, see if another train comes, and if it didn't, you go back in when they call you and stop it when it comes.

Q. Have you been running to Kingman for some time? A. Yes.

Q. You are acquainted with the country there?

A. Yes, sir. [12]

Q. Do you know a place known as Peggy's Cafe?

A. Yes, sir.

Q. Now, from where you were standing on the railroad tracks at which you were doing this flagging, did you have a view of Peggy's Cafe?

A. Very near opposite that cafe.

Q. Approximately how far away?

A. Well, about 75 or a hundred yards.

Q. Across the highway?

A. Across the highway on a little strip of ground between the highway and the railroad.

Q. I believe at that time the railroad, that is, the westbound track, runs generally westerly through Kingman? A. Yes, sir.

(Testimony of Dewey A. Pennington.)

Q. And Highway 66 parallels that road, doesn't it?

A. Yes, sir.

Q. How long did you remain at this place where you were flagging?

A. We stayed there about ten minutes.

Q. While you were there did you observe any truck in the vicinity of Peggy's Cafe?

A. Yes, I saw a truck sitting there at the west corner of the building.

Q. What kind of a truck was it; that is, could you tell?

A. I don't know what make it was; but it was about a ton and a half truck.

Q. Did it have anything connected with it in the way—a semi-trailer, or could you see that?

A. No, I didn't see any trailer.

Q. Well, all right. Go ahead now and tell what you saw there.

A. The only place open was at Peggy's Place and naturally I looked up that way. There was no one stirring over there as I saw this truck sitting there, and after it was back there a few minutes, a car drove up and a soldier and his wife got out and went inside.

Q. Which way was he going?

A. The truck was headed west.

Mr. Struckmeyer: May I have the previous answer read?

(The answer was read by the reporter.)

Mr. Morgan: I believe you made the statement

(Testimony of Dewey A. Pennington.)

concerning this matter a long time ago, didn't you?

A. Yes, sir.

Q. I think you reported this as a stock truck. What did you mean by a stock truck?

A. It had a stake body. It looked like it [14] was made and fixed up for hauling stock.

Q. Did that truck remain there all the time you were there? A. Yes, sir.

Q. Then I presume you got on your train and went west? A. Yes, sir.

Q. Now, the rear end of this truck with relation to Peggy's Cafe was approximately where?

A. Well, about—the truck—the cab of the truck out to the hood was out there behind the place.

Q. Sir?

A. Was sticking out behind the place. The body of the truck was sitting in front of the place.

Mr. Morgan: I think that is all. You may take the witness.

Cross-Examination

By Mr. F. C. Struckmeyer, Sr.:

Q. You did not go into the buffet?

A. No, sir; I never left the railroad.

Q. You did not see the accident on the railroad?

A. No. [15]

Q. You left there before? A. Yes, sir.

Q. And you did not see the truck leave this place where it was parked? A. No, sir.

Q. There were two trucks parked there, did you say? A. No, just one.

(Testimony of Dewey A. Pennington.)

Q. Which one?

A. I don't know what truck it was. I just saw one setting there.

Q. You saw it sitting there, and then another truck came up afterwards?

A. No, a car came up.

Q. A car came up? A. Yes.

Q. And where did it park?

A. On the opposite corner of the front of the building.

Q. Right close to the truck?

A. No, it had the building between them. The truck was at the west corner and the car was parked on the east corner.

Q. And the soldier got out?

A. The soldier and his wife got out and went inside. [16]

Q. Inside where? A. In the restaurant.

Q. Into the restaurant? A. Yes, sir.

Q. Well, you mean a soldier and a lady with him? A. Yes, sir.

Q. You didn't see their marriage certificate?

A. No.

Q. Many other soldiers around there at that time? A. I didn't see anyone else.

Q. How?

A. I didn't see anyone else.

Q. You didn't see anyone else. That was in March, 1944? A. Yes, sir.

Q. Did you stay out and flag for the other west-bound train? A. How is that?

(Testimony of Dewey A. Pennington.)

Q. Did you put out a flag or anything for the other westbound train?

A. No, it wasn't necessary.

Q. It wasn't necessary? A. No, sir.

Q. You pulled out? In other words, Train No. 1 [17] pulled out before Train No. 3 came in?

A. That is right.

Q. You have been interrogated about this many times, haven't you, by railroad officials?

A. No, I never have.

Q. Never have? A. No.

Q. You are aware that actions were brought by Mr. Rayburn and Mr. Trotter in California, are you not, and that they charge you with negligence——

Mr. J. H. Morgan: We object to that as improper cross-examination and move that it be stricken and the jury instructed to disregard it.

The Court: The objection is sustained. All right, disregard it.

Mr. Struckmeyer: You are in the employ of the Railroad now? A. Yes, sir.

Q. As conductor? A. Conductor.

Q. On passenger service? A. Yes.

Mr. Struckmeyer: That is all.

Mr. Morgan: That is all.

(The witness was excused.)

Mr. Morgan: Mr. Frank Christensen. [18]

The Court: Before you call him, we will have our morning recess. During the recess you are not to discuss the case among yourselves or permit any-

one to discuss it with you. Avoid forming or expressing an opinion on this subject. We will stand at recess for about five minutes.

(Thereupon a short recess was taken, after which all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

The Court: You may call your next witness.

FRANK L. CHRISTENSEN

was called as a witness by the plaintiffs for cross-examination, and being first duly sworn, testified as follows:

Cross-Examination

By Mr. Morgan:

Q. What is your name, please?

A. Frank L. Christensen.

Q. Where do you live, Mr. Christensen?

A. Flagstaff, Arizona.

Q. On March 24th, 1944, were you the sole owner of what is known as the Lightning Delivery Company?

Mr. Struckmeyer: That is negative, if your [19] Honor please.

The Court: That is what?

Mr. Struckmeyer: That is a negative answer.

Mr. Morgan: I wanted to——

The Court: Oh, well, he may answer.

Mr. Struckmeyer: All right.

The witness: A portion of it——

Mr. Morgan: Sir?

(Testimony of Frank L. Christensen.)

A. A portion of the original Lightning Delivery Company. In January 1st, 1943, I sold the baggage and transfer and one line and retained the stock hauling portion of the Lightning Delivery Company, doing business as Frank L. Christensen.

Q. That you retained? A. Yes, sir.

Q. By stock hauling, you mean you have trucks for hauling stock? A. Yes, sir.

A. Well, with respect to this truck which was involved in this accident at Kingman on March 24th, were you the sole owner of that truck?

A. Yes, sir.

Q. Who was driving the truck?

A. Conda E. Wilson.

Q. He was your employee?

A. Yes, sir. [20]

Q. At the time he drove the truck to Kingman and parked it there somewhere, he was your employee? A. Yes, sir.

Q. He was on your business. A. Yes, sir.

Q. What is the number of that truck?

A. Well, it was my number 15 in the old original fleet. I imagine you will call it No. 2. That is all I had left.

Q. I mean do you recall the license number?

A. My license number, no, sir.

Q. What make was the truck?

A. It was a Ford.

Q. What year? A. '41.

Q. Did it have a trailer; was it known as a stock truck? A. It was known as a semi-trailer.

(Testimony of Frank L. Christensen.)

Q. A semi-trailer which had stakes, I assume, for hauling stock? A. Yes, sir.

Q. Mr. Francis had no interest at all in this business at that time? A. No, sir.

Q. You were the sole owner of this part of the business? [21] A. Yes, sir.

Q. I believe you also hold a certificate with the Corporation Commission of Arizona?

A. Yes, sir.

Q. You were transacting business at that time as a common carrier? A. Yes, sir.

Q. Well, it was your truck that was involved in this accident, the one that ran on the tracks, for some reason, and derailed an engine or two?

A. It was my truck, yes, sir.

Mr. Morgan: That is all, Mr. Christensen.

Mr. Struckmeyer: That is all.

(The witness was excused.)

Mr. Morgan: Now, all other defendants may be dismissed in the case except Mr. Christensen, since Mr. Francis is not involved.

The Court: Very well.

Mr. Morgan: Call Mr. T. W. Atkins.

THOMAS W. ATKINS

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows: [22]

Direct Examination

By Mr. Morgan:

Q. What is your name, please?

A. Thomas W. Atkins.

(Testimony of Thomas W. Atkins.)

Q. Where do you reside, Mr. Atkins?

A. Needles, California.

Q. Are you employed by the Santa Fe Railroad Company? A. I am.

Q. How long have you been in the employ of that organization?

A. I have been in Needles approximately 12 years, and previous to that, for a number of years.

Q. Were you employed by that Company on the morning of March 24th, 1944? A. I was.

Q. Were you at that time connected or serving on the second section of No. 3, a passenger train westbound?

A. I was helper conductor in No. Section 3.

Q. You were what?

A. I was helper conductor.

Q. Do you recall that on the morning of that day, March 24th, there was a wreck, a collision at Kingman? A. Yes, sir. [23]

Q. Will you tell the jury just where you were when that occurred, which way you were going, in your own words.

A. Which way the train was going?

Q. Yes.

A. I was helper conductor on Second 3 this morning in question and I was in about the second coach at the time the train went into emergency, which indicated to me that something very unusual had happened. As soon as the train came to a stop, I went to the rear of the train to see if any of the passengers had been injured in any way, and find-

(Testimony of Thomas W. Atkins.)

ing none of them injured I came back to the head end of the train, got out of the head car and walked up to the right side of the train and seen that the engine—two engines and the baggage car had been derailed. I went around and looked at the truck which had been pushed in front of the lead engine to where they came to rest, and nobody was in the truck, and I went on around and up the other side of the train back to where the derailed—approximately where the truck had been sitting, and looked for the tracks on the other side of the rails, for the truck tire tracks, that is what I was looking for, and those I found a few feet west of this facing [24] point switch.

Q. A few feet west or east?

A. East of the facing point switch, and I went back around the same way and I came—and on the other side and for a short distance north and east I traced tire tracks of this truck, seen that they had come from that general direction, and then I went back over to the wreck and stayed there until the ambulance came and went with Mr. Rayburn to the hospital.

Q. When you got off the train and went up to the front end, with respect to the Kingman Station, where were the engines?

A. Well, they were, oh, I should say 150, 200 yards east of the Kingman Depot. That is just a rough guess.

Q. With respect to the tool sheds which at that

(Testimony of Thomas W. Atkins.)

time existed on the north side of the Railroad, where were those engines?

A. Well, the best I remember, they were west of the tool houses.

Q. How many engines were there on that train?

A. Two.

Q. You were going west? A. Yes, sir.

Q. What time of the morning was it that this [25] accident occurred?

A. Well, it was some time after one o'clock, I presume, but I wouldn't know for sure. I have no record of that. It was in the morning.

Q. Now, at the time you went up to the head engine, where was this truck?

A. Well, it was right in front of it, just where it pushed it down the track.

Q. It was held across what we commonly call the cow-catcher? A. Yes, sir.

Q. What is the proper term used for the front of the engine? A. Pilot.

Q. It was across the pilot. Now, did it have anything attached to the truck, anything attached to it?

A. Well, the best I remember, there was a trailer tied onto it, because the cab was on the left side of the engine, so there must have been something on the other side that I didn't pay any particular attention to.

Q. Now, these tracks ran, getting back to these tracks again, you found some tire tracks. Just where did you find these tracks?

(Testimony of Thomas W. Atkins.)

A. Well, they were about a foot over the [26] outside rail, two tires, two front wheels just dropped down like that. Of course, the rest of it had been obliterated near the track, between the track, but that much was left. They were clear and distinct.

Q. The railroad at that point runs west, does it not? A. Yes.

Q. How was the truck pointed; was the front end of the truck pointed towards the south?

A. Pointed south, yes, sir.

Q. These tire tracks you found were just over the south rail? A. That is right.

Q. Then from that point you followed those tracks in what direction?

A. Well, from that point I went back around the head of the train the same way that I came and then I followed them in a northeasterly direction.

Q. Did you see any buildings or cafes or anything like that?

A. Well, yes, there were buildings over there, but I didn't go that far.

Q. Do you know a place known as Peggy's Cafe, which was lighted up? [27]

A. Yes, I am acquainted with that place.

Q. Did you see that place?

A. I saw the place but I didn't go anywhere near that far.

Q. With respect to the vicinity of Peggy's Cafe, how did these tracks run from the railroad?

A. Well, they ran in a general direction of

(Testimony of Thomas W. Atkins.)

Peggy's Cafe from the point where I found them on the track there.

Q. Are you familiar with the contour of the ground there? By that, I mean how it slopes.

A. Fairly well, yes. It has a slope in a south-westerly direction there.

Q. Well, from the vicinity of this cafe, you mean across the road? A. Yes, to the track.

Q. Did you see one of the plaintiffs in this action?

A. John Rayburn, I saw him. He was laying on the ground in the vicinity of this little tool house.

Q. What condition was he in?

A. Well, he was in bad condition. I didn't see him when I first went around there. It was when I came back that I found him.

Q. He was on what side of the track? [28]

A. He was on the right side of the track. That would be on the north side.

Q. Do you know what engine he was on?

A. He was on the second engine.

Q. Was the second engine derailed also?

A. Yes, sir.

Q. What, if anything, did you do for Mr. Rayburn?

A. Well, I talked to him a little bit, that is all I could do while I was waiting for the ambulance. You couldn't move him, or anything.

Q. Were you there when the ambulance took him away? A. Yes, I went with him.

Q. You did? A. Yes.

(Testimony of Thomas W. Atkins.)

Q. Where did you go?

A. To the hospital, the City Hospital there at Kingman.

Q. Did you learn what his injuries were?

A. Well, approximately, yes. I couldn't say until they finished X-raying him, but I stayed as long as I could, and his arms were fractured and they thought at that time he had a leg fracture.

Mr. Struckmeyer: If your Honor please, there is [29] medical testimony——

The Court: Yes.

Mr. Morgan: I don't think it is material. I believe that is all.

Cross-Examination

By Mr. Struckmeyer:

Q. You followed the tracks of the truck back where it was supposed to have been parked, did you?

A. In that general direction, only a short distance from the track.

Q. How far?

A. Oh, I expect 20 or 30 feet.

Q. A very heavy grade, is it, from down——

A. Well, I wouldn't know how many feet per hundred feet fall it is, but I should imagine it should be around ten feet to the hundred feet, something like that.

Q. All right, and the truck itself was on the pilot?

A. Yes, sir.

Q. Had been pushed about how far?

A. Well, let's see. That would be the length

(Testimony of Thomas W. Atkins.)

of two engines and a baggage car and about half of a coach, I should imagine would be the distance. [30] A coach is about 60 feet long.

Q. It had been pushed a distance of two engines, you said? A. Yes, sir.

Q. And a baggage car? A. Yes, sir.

Q. And half a coach?

A. Approximately that is what I imagine.

Q. How far do you figure it had been pushed?

A. Well, I wouldn't say in feet, because I don't know how long an engine is in feet.

Q. Well, several hundred feet?

A. A couple, I should imagine.

Q. And it was still on the pilot when you saw it?

A. Well, it was across the front of the engine on the pilot. It wasn't entirely on the engine? It was on the ground.

Q. You don't know how it came there, the truck?

A. No.

Q. It looked as though the front wheels had stopped on the track, is that right?

A. The front wheels had not crossed both rails.

Q. Both rails? A. Yes.

Q. And then come to a stop? [31]

A. Yes, sir.

Q. The track itself is lifted? A. No.

Q. Well, the track is not flush with the ground?

A. It is in the yard; it is all smooth there. They do quite a bit of switching down there.

Q. You were not able to state how it got there?

A. I wouldn't know how it got there.

(Testimony of Thomas W. Atkins.)

Q. The Train No. 1 which had stopped there was carrying troops, was it not?

A. I don't know about No. 1. I have no idea what they had on No. 1.

Q. No. 3 was carrying what? You were on No. 3.

A. I was on Second 3, Second Section 3. It was a coach train.

Q. And it was carrying troops?

A. Passengers.

Q. Passengers, mixed passengers?

A. Oh, there was lots of them soldiers, but they were all furloughed soldiers on leave.

Q. Yes. Yes. Did you examine the truck itself?

A. Only to see if there was a driver in it.

Q. Did you look at the brakes, whether they were locked or not? A. No, sir. [32]

Q. Did you see whether or not the keys were in the truck? A. No, sir.

Q. You don't know anything about the condition of the truck itself, then?

A. Well, it was pretty badly mangled up.

Q. Yes, but outside of that you don't know anything about it? A. No, sir.

Mr. Struckmeyer: That is all.

Mr. Morgan: That is all. Thank you.

(The witness was excused.)

Mr. Morgan: Mr. Marbell.

SAM MARBELL

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Morgan:

Q. Will you state your name for the record?

A. Sam Marbell.

Q. Where do you reside, Mr. Marbell?

A. Kingman, Arizona.

Mr. Morgan: Will you mark these photographs as one exhibit, Exhibit 1 for identification, [33] 2, 3, this one 4, this one 5, this one 6, this one 7, and this one 8.

(The documents were so marked.)

Q. (By Mr. Morgan): In 1944, did you hold some official position with the State of Arizona?

A. I did.

Q. What was that position?

A. Highway Patrolman.

Q. What, sir? A. Highway Patrolman.

Q. Where were you located?

A. Kingman, Arizona.

Q. How long have you lived in Kingman?

A. 13 years.

Q. How long were you Highway Patrolman?

A. Not quite three years.

Q. At that time was there any Highway Patrolman stationed there also?

A. Temporarily, yes, sir.

Q. Who was that? A. Mr. John Willis.

Q. Now, on the early morning of March 24th,

(Testimony of Sam Marbell.)

1944, were you called by anybody to investigate an accident that occurred? A. I was.

Q. About what time of the morning? [34]

A. I'd say it was about 1:30 or 1:35.

Q. Where did you go?

A. To the scene of the accident. It was on the Santa Fe Railroad tracks in Kingman.

Q. You made an investigation at that time?

A. I did.

Q. What did you find there?

A. I found a Ford truck, a semi-stake body, stock trailer laying across the tracks directly in front of the train, a double engine train.

Q. And at what point on the Santa Fe Railroad?

A. With relation to the Santa Fe Depot there, possibly about a thousand yards.

Q. East? A. East of the depot.

Q. With respect to what is known as the cross-over switch or track, where were those engines?

A. They were stradling the cross-over; I do believe, at that time. I mean by that, both engines and all of the cars involved, they were right at that point.

Q. What truck did you find there in this situation? A. I found—what truck?

Q. Yes.

A. I found a Ford truck with a stock trailer [35] attached. My investigation disclosed that it belonged to Mr. Frank L. Christensen and was being driven by someone else at that time for transporting livestock.

(Testimony of Sam Marbell.)

Q. Were you able to ascertain where the first collision occurred between the truck and the engine?

A. Not definitely, only to draw an imaginary line from the last visible point where the tracks of the truck were visible, to where they were obliterated, which would indicate that they crossed the tracks at that point.

Q. By that you mean you found some tracks that indicated the truck had crossed the track?

A. That is right.

Q. Where did you find those tracks?

A. They were on the north side of the track in about—in a—oh, southwesterly direction heading towards the tracks.

Q. That would be east of where you found the pilot engine with the truck hanging on the pilot?

A. Yes.

Q. About how far east?

A. Oh, approximately 40 to 50 feet.

Q. In other words, the truck had been struck at a certain point and dragged westward? [36]

A. That is right.

Q. In dragging it westward did it knock down any switch station?

A. I didn't particularly notice any switch stations damaged.

Q. There were two engines on this train?

A. There was.

Q. Now, the pilot engine, will you tell the jury how that pilot engine was, was it derailed?

A. It was derailed, yes, it was.

(Testimony of Sam Marbell.)

Q. Leaning in what direction?

A. It was leaning to the south or on its left side heading west and off of the south side of the tracks.

Q. The second engine?

A. The second engine was just the opposite. It was headed more northerly and off the tracks as though they were beginning to jackknife. In other words, it appeared as though they started in separate directions and stopped right there.

Q. At the time you reached the scene of this accident did you see any enginemen?

A. I did not.

Q. They had been taken away?

A. Yes, they had.

Q. Now, then, did you attempt to ascertain [37] from where the truck had come?

A. Yes, I did.

Q. And were you able to ascertain where it had come from?

A. Yes. At the time, the information that I gathered and the inspection that I made led me to believe that the truck had been parked in the vicinity——

Mr. Struckmeyer: Just a minute.

Mr. Morgan: Go right ahead.

A. I was making an investigation in an official capacity, and I made it my business to try to find out the details. My investigation disclosed that the truck was parked in the vicinity of what is known—what was known then as Peggy's Cafe, which would have been across the U. S. Highway 66, approxi-

(Testimony of Sam Marbell.)

mately 150 yards northeast of the scene of the accident.

Q. Did you ascertain in what way it was parked? By that I mean was it pointed westward on the road or eastward?

A. It was parked in a jackknife position, the cab headed—the front of the truck head west.

Q. On the north side of the road?

A. On the north side of the road.

Q. Would that be partly on the right of way?

A. Yes, it would, off the pavement.

Q. Now, from that point where you ascertained the car had been parked, can you tell the jury what the grades are, the contour of the country?

A. Yes. In the vicinity of Peggy's Cafe from the spot where the truck was originally parked, that is on a knoll, it is high ground on the north side of the highway. The road there makes two little dips. The first one is considerably east of that point and then it raises again on a knoll where Peggy's Cafe sits, on a little high ground, and from there then it slopes again southwest, south—it slopes—the general contour of the road is downgrade west, and the contour of the terrain on the south side of it is southwest. In other words, it rolls off that knoll, so to speak.

Q. How much of a grade exists there between the railroad at the point where you found these tracks on the railroad and Peggy's Cafe?

A. The overall grade?

Q. Yes.

(Testimony of Sam Marbell.)

A. I never have tried to ascertain the definite amount of grade there, but I would say——

Mr. Struckmeyer: If your Honor please, I object to it, he has never ascertained it. That [39] is a matter of accurate measurements.

Mr. Morgan: Oh, no, no, it is an estimate.

The Court: All right. You may answer.

A. I'd say about a four per cent grade.

Mr. Morgan: I will put it this way: How much lower is the railroad track right in front of Peggy's Cafe, or alongside of Peggy's Cafe where this car was probably parked?

A. Approximately 14 feet, 14 or 15 feet.

Q. And the distance you say is 150 yards?

A. That is right.

Q. A car or truck of the kind and character involved in this accident, parked in the vicinity of Peggy's Cafe, if the brakes became loosened for some reason, it would be the natural thing to roll down in that direction and upon the tracks?

A. Yes, it would.

Q. Did you take some photographs?

A. I did.

Q. I hand you here Plaintiffs' Exhibits 1 to 8 for identification. Are those the photographs of the truck and the engines involved in this action?

A. Yes, they are.

Q. When were those taken?

A. The night of the accident, oh, somewhere between about two or two-fifteen. A part of them were between two and two-fifteen the morning of the 25th

(Testimony of Sam Marbell.)

—the 24th, and the balance of them were taken the next morning after daylight.

Q. Some of them were taken by flashlight?

A. That is right.

Q. And these generally depict the situation as you saw it and as you came there on the morning of the 24th? A. Yes, sir.

Mr. Morgan: We offer these in evidence.

Mr. James Struckmeyer: May we see them?

(The documents were handed to the attorney.)

Mr. James Struckmeyer: If the Court please, we object to the introduction of the photographs taken the following morning, on the ground that after the two which show the truck, the truck at that time had been moved off the right of way by the Santa Fe Railroad Company and they do not actually represent and picture the condition at the time of the accident, and the same objection as to the other two taken in daylight, that they show by the pictures men working on the highway, and does not accurately represent the occasion. The other four we do not object to.

The Court: I will sustain the objection. [41]

(Thereupon Exhibits 2, 3, 7 and 8 were withdrawn.)

Mr. Morgan: Is that 2, 3, 7 and 8?

Mr. James Struckmeyer: The flash pictures we do not object to.

(Thereupon the photographs were marked as Plaintiffs' Exhibits 1, 4, 5 and 6 in evidence.)

(Testimony of Sam Marbell.)

Q. (By Mr. Morgan): Handing you now Nos. 1, 4, 5 and 6, which have been admitted in evidence, will you take them in order, take No. 1, and will you tell the jury—you might hold it up so the jury can see it, and tell them what it represents.

A. Gentlemen, this photograph was made by myself soon after the accident happened, and that represents the truck, or a portion of it, the cab and the front of the engine. You see that?

Mr. Morgan: Just hand it to the jury.

Mr. Struckmeyer: Will you refer to it by number?

The Witness: No. 1.

Q. (By Mr. Morgan): This is No. 1.

The Witness: This is No. 4, which was also taken by me at the same time of another portion of the engine. No. 5 picture of the engine 1306 taken at the same time, and No. 7 is a picture trying to show the attitude of the engine at the [42] time. I took it from the north side.

Q. You didn't see the injured plaintiffs?

A. Beg pardon?

Q. You didn't see either of the injured plaintiffs, I take it? A. No, I did not.

Mr. Morgan: I believe that is all, Mr. Marbell. You may cross-examine.

Cross-Examination

By Mr. F. C. Struckmeyer, Sr.:

Q. Who are these two posiers on one of these pictures, I mean those two men; that is Exhibit No. 4?

(Testimony of Sam Marbell.)

A. Those are the crew on that train, on that engine.

Q. Oh, I see. They were on the witness stand here before, they were in the courtroom?

A. I didn't recognize them.

Q. Where had this truck been parked—you followed it backwards up, where had it been parked?

A. Up in front of Peggy's Cafe, up on the west side of Peggy's Cafe.

Q. I mean the precise point of parking, had it been parked in front of Peggy's Cafe?

A. It was parked west of Peggy's Cafe. The [43] precise point I had no way of determining.

Q. You are not able to state where it had been parked, the precise point? A. Yes.

Q. The precise point?

A. Not the precise point, no, sir.

Q. It was parked in the parking area, was it not? A. No, sir.

Q. It was parked in front of the service station, was it not? A. No, sir.

Q. Where was it parked?

A. It was parked between the building that was used at that time as a garage, and Peggy's Cafe.

Q. What is that building used for next to Peggy's Cafe? A. A garage.

Q. Garage? A. That is right.

Q. Immediately adjoining Peggy's Cafe is the garage?

A. No, sir. There was an area between the two buildings.

(Testimony of Sam Marbell.)

Q. Can you draw a diagram? [44]

A. I believe I can.

Q. I wish you would draw a diagram where it was parked. First draw Peggy's Cafe and the highway, I suppose.

(Thereupon the witness draws diagram on the blackboard.)

Mr. Struckmeyer, Sr.: Now this one here you have marked "garage," mark that "A", will you please, so we may be sure about that.

(The witness complies.)

Q. And "B" is Peggy's Cafe.

(The witness complies.)

Q. All right. Now, the truck was parked where? Draw a diagram where the truck was parked.

(The witness complies.)

Q. And it was parked which way, facing which way? A. Facing west.

Q. Facing west? A. Headed west.

Q. It pointed toward the west and that is an open area, an alleyway?

A. Yes, sir. It is not an alleyway. It is an open area, but private property.

Q. Private property? A. Yes, sir. [45]

Q. What is immediately west of the garage?

A. Service station.

Q. Mark that, please.

A. (Complying) This is the building and this is the surrounding area.

Q. You are positive that the truck was parked

(Testimony of Sam Marbell.)

where you have indicated there, you are positive of that?

A. I didn't see the truck parked there, but my investigation told me that the truck was parked there.

Q. You investigated that the next did, didn't you, not with Mr. Christensen?

A. I investigated it the same night, it seems to me right after the accident happened.

Q. And you investigated it with Mr. Christensen afterwards, did you not? A. No, sir.

Q. Did you talk with Mr. Christensen?

A. I don't believe I did.

Q. Did you take a statement from him?

A. No, sir.

Q. Did you take a statement that night from Wilson, the driver? A. No, sir.

Q. Have you your notes on your investigation?

A. No, I don't.

Q. Where are they?

A. They are in the Highway Department.

Q. Are you still in the employ of the Highway Department? A. No, sir.

Q. Who has charge of them in the Highway Department now?

A. Who has charge of the Highway Department?

Q. Who has charge of your notes?

A. I assume that the Highway Patrol and the Safety Division has them.

Q. Who are you employed by now?

(Testimony of Sam Marbell.)

A. I am self employed now.

Q. Photographer?

A. No, sir; that is just a hobby.

Q. You are employed at Kingman?

A. Yes, sir.

Q. Running a business there?

A. Yes, sir.

Q. At Kingman? A. Yes, sir.

Q. What business?

A. Tourist court and service station.

Q. Tourist Court? A. Yes, sir. [47]

Q. Could it not have been possible that this truck was parked further over west from where you say it was parked?

A. No, it could not.

Q. It could not have been? What made you say—Can't you get your notes from the Highway Department? A. I don't think so.

Q. Did you check the truck at all?

A. I did.

Q. What was the condition of the brakes?

A. I didn't check it mechanically; I wouldn't know.

Q. Was the key in the lock?

A. I didn't notice whether the key was in the ignition switch or not.

Q. Was it in gear? A. Yes, it was.

Q. What gear? A. I don't know.

Q. How do you know it was in gear then?

A. Because I checked it.

Q. That night?

(Testimony of Sam Marbell.)

A. That has been three years ago, yes, sir.

Q. Been three years ago? A. Yes, sir. [48]

Q. If we were able to get your notes from the Highway Department it would refresh your recollection, would it not?

A. Yes, uhuh. There are no notes of mine with **the Highway Department.**

Q. You turned your notes in to the Highway Department?

A. I did not. My associate did.

Q. You took a statement from Mr. Wilson, did you not, the driver? A. I did not.

Q. You talked to him that night?

A. I did.

Q. You did not take a statement from him?

A. I did not.

Q. You did not ask him where he had parked his car? A. Yes, I did.

Q. What did he answer?

A. He pointed to the general direction of the cafe.

Q. You made notes of it, though?

A. Yes, I did.

Q. But you did not turn those notes in to the Highway Department? A. I did not. [49]

Q. Where are those notes now?

A. I don't know, probably have been destroyed.

Q. When did you leave the Highway Patrol Service? A. Oh, 1945.

Q. Wasn't it customary at that time that im-

(Testimony of Sam Marbell.)

mediately—you made a report to the Highway Department? A. I did not.

Q. You did not? A. No, sir.

Q. Wasn't it customary to make a report to the Highway Department on any accidents that you had investigated? A. Yes, it was.

Q. And wasn't it customary with the Highway Department that you turn in your notes which you had taken? A. That is right.

Q. But you did not do so?

A. That is right.

Q. Why not?

A. Because my associate did. There were two of us working on the case.

Q. Is he here? A. Yes, he is. [50]

Q. He is here? A. That is right.

Q. He took the notes? A. Yes, sir.

Q. He has the notes now?

A. I don't know.

Q. These pictures were a part of the Highway Department's photography, were they not, a part of your report? A. No, sir.

Q. Did you turn in any pictures to the Highway Department? A. I personally did not.

Q. Did your associate? A. I don't know.

Q. Did you give him copies of the pictures?

A. I don't remember whether I did or not.

Q. To whom did you deliver these pictures that were introduced in evidence?

A. Those pictures that were introduced in evidence were made and processed by myself and sent

(Testimony of Sam Marbell.)

to a man at Needles who was directly interested in this accident. As a matter of fact——

Q. Who? A. I think a Mr. Peeler.

Q. Peeler? [52]

A. I think that is right.

Q. He was the engineer, was he not, of the Santa Fe?

A. He was a part of the crew on a train. In what capacity, I don't know.

Q. On Train No. 3?

A. Yes, that is right.

Q. He was the engineer on the first engine, was he not? A. I think so, on No. 1306.

Q. Did you take a statement from him at the time? A. No, sir.

Q. Did your associate? A. I don't know.

Mr. Struckmeyer: That is all.

Redirect Examination

By Mr. Morgan:

Q. You were asked, Mr. Marbell, if this truck could have been parked down somewhere in this section and you said no, it could not have been. Will you explain why it could not have been parked there? A. I could explain that.

Q. Go right ahead. [53]

A. It had to do with the contour of the ground. The reason that it could not have been parked here——

Mr. Struckmeyer, Sr.: Well—go ahead.

A. To be parked here is because the highway from the center line slopes to the north and to the

(Testimony of Sam Marbell.)

south, and in order to—and at this point it slopes from the north to the south, and in order for the truck to have moved from this position or anywhere in the vicinity of this accident, which has a level driveway, perfectly level, practically as perfect as they could get it, would have to be under power to get over the hump in here and drop down here, a ways here. It is all downgrade with no obstruction. It could not possibly have moved from this point to here unless it was under power and being driven over it.

Mr. Morgan: Q. Now, referring again to the sketch that you made, Mr. Marbell, in which you place the truck itself apparently towards the highway. Would that be within the boundaries of the highway, the truck?

A. You mean the right of way?

Q. The right of way. A. Yes.

Q. Would you mind running a line along where the right of way exists there?

A. With relation to the approximate position of the truck?

Q. Yes, and the buildings. As I understand, these marks indicate the paved portion of the highway? A. That is right.

Q. Now, the north line of the right of way, where would that run with reference to those buildings?

A. About, oh, here, and then I would say, in

(Testimony of Sam Marbell.)

relation to the buildings, this building in particular is about six feet.

Q. Six feet south of the south boundary wall of the building, Peggy's Cafe?

A. That is right.

Mr. Morgan: I believe that is all.

Recross-Examination

Mr. Struckmeyer:

Q. The only reason you say the car was not parked over here in the garage area is because it could not have gotten away on its own power?

A. No, sir.

Q. Unless somebody interefered with it, somebody set it in motion? [55]

A. That is right.

Q. But over here where you placed it, it could have gotten away on its own motion?

A. That is right.

Q. Even though it was locked and the brakes set?

A. That is right.

Q. The brakes set?

A. With mechanical failure it could have done anything. I don't know whether the brakes were set or not.

Q. But there would have to be mechanical failure before it could of its own motion?

A. Either that or negligence on the part of the driver in not setting the controls.

Q. In not setting the controls, yes.

A. Yes.

Q. But if it had been parked in this garage

(Testimony of Sam Marbell.)

area it could not have gotten away at all unless somebody had caused it? A. That is right.

Q. That, where you have drawn the truck as being parked, that is a part of the common parking area, is it not? A. No, it is not.

Q. Trucks and cars used to park there? [56]

A. I can't say.

Q. They did, did they not?

A. I don't know.

Q. It was right where you parked it, it is still a part of the highway, is it not, this upper line that you drew here, that is as far as the highway itself exists?

A. The highway right of way. This line represents the right of way, and this line represents the paved portion of the highway.

Q. I see.

A. This is all private property. There is an alleyway or areaway there.

Q. But the highway itself is up under the upper line? A. Yes, sir.

Q. Mark that "Upper line" some place to indicate it. That is your highway, is it?

A. That is right.

Q. You have seen cars parked there, which is about in a position where you put this car?

A. I don't believe that I ever remember seeing a car parked there.

Q. May have been, though?

A. There may have been, it is possible.

(Testimony of Sam Marbell.)

Q. As a matter of fact, people going into [57] Peggy's Cafe, they park along there, do they not?

A. Along in front of the cafe usually.

Q. In front or to the west?

A. I don't ever remember seeing parked there.

Mr. Struckmeyer: That is all.

Redirect Examination

Mr. Morgan:

Q. Just a minute. Now, while you are there, Mr. Marbell, I wonder if you could just sketch in the railroad track going westbound, the west track.

A. The west track runs parallel to the highway at this point. I'd say with relation to the highway it is about like that (indicating on diagram).

Q. Now, where you saw these tracks crossing the railroad track, would you have room on that plat there to show where it would be extended westward?

A. I ran out of board here, but the tracks that were visible were about at this point and headed this way (indicating on diagram).

Q. Were there any obstructions between the point on the railroad tracks where you saw the tire marks and Peggy's Cafe that would prevent a [58] car that got loose, a truck from running down on the tracks?

A. Following the path it took, no, but on either side there are.

Q. There was an open way, was there not?

A. Yes, there was.

Mr. Morgan: That is all.

(Testimony of Sam Marbell.)

Mr. Struckmeyer: One more question. This sketch, of course, so far as distances are concerned, that you have drawn there is relative. Will you, without exact measurements, point out 75 to 100 yards west of Peggy's Cafe, mark that 75—I am not asking you for precise measurements, but approximate, 75 to 100 yards west of Peggy's Cafe?

(The witness complies.)

Q. Would you mark it below here—I don't mean on the way down, 75 yards west of Peggy's Cafe, if you will mark that, 75 to 100 yards.

(The witness complies.)

Mr. Struckmeyer: All right, that is all.

The Court: The Court will stand at recess until two o'clock. Keep in mind the Court's admonition and report back at two.

(Thereupon a recess was taken at 12:00 o'clock noon.) [59]

2:00 o'clock, p.m.

All parties, as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: Call your next witness.

Mr. Morgan: Mr. Trotter, please.

CHARLES LEE TROTTER

was called as a witness in his own behalf, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. What is your name, please?

A. Charles Lee Trotter.

(Testimony of Charles Lee Trotter.)

Q. Are you the plaintiff in one of these cases?

A. I am.

Q. Where do you live, Mr. Trotter?

A. Needles, California.

Q. At the present time are you employed by the Santa Fe Railroad Company? A. I am.

Q. In the year 1944, were you employed by that Company? A. I was.

Q. In what capacity? [60]

A. Locomotive fireman.

Q. How long have you been a fireman?

A. Approximately three years.

Q. I presume you recall the date of March 24th, 1944, in reference to a collision that occurred at Kingman, Arizona? A. I do.

Q. Had you been running over that road for some time? A. Yes, I had.

Q. Prior to that date? A. Yes.

Q. Were you employed on one of the trains that morning?

A. I was fireman on the second engine.

Q. The second engine of what train?

A. Second section of No. 3.

Q. About what time was it due in Kingman?

A. Well, it was running late that morning.

Q. Well, do you know about what time it would have come in?

A. No, I can't. We have had so many changes in the time table than we had time table to furnish that information.

(Testimony of Charles Lee Trotter.)

Q. Do you know whether you were due for a stop at Kingman that day? [61]

A. Yes, we were.

Q. Well, about somewhere about 1:20, or thereabouts, on the morning of the 24th of March, 1944, you say you were firing the second engine?

A. Yes, sir.

Q. Who was on the first engine?

A. Mr. Peeler was engineer and Mr. Gibson was the fireman.

Q. Who was the engineer on your engine, the second engine? A. Mr. Rayburn.

Q. Mr. who?

A. Mr. Rayburn, John S. Rayburn.

Q. Will you tell the jury now in which direction you were going and how you did come to come into Kingman that morning?

A. We were going west and we had to stop, you know, at the station, and when we came around the curve and on the straight track, I looked out the window and saw an object, a truck on the track, and I hollered to the engineer that there was a truck on the track, and the next thing I saw was the fireman on the head engine, he was climbing back on the tank, and that looked like a good move to me, so I attempted to climb back on the tank of my engine. Well, as I got up on the top [62] step, the engine went on the ground and the cab struck me on the head with a terrible blow and knocked me back into the gangway and pinned me

(Testimony of Charles Lee Trotter.)

between the tank and the cab of the engine, and I don't know how long I was there, but the next thing I remember, I was going up alongside of the engine, and I kind of come to myself and I thought of the engineer, I wondered what happened to him or where he went, so I managed to climb between the engine and the first car to the right side of the engine, and there I found Mr. Rayburn laying on the ground up close to a shed, and I thought he was dead, and I took hold of him and shook him, and he hollered that he was in very much pain, that that arm was broken, not to shake it no more, so I knew I was quite badly hurt, but I knew he had to have help, I knew he was hurt bad, so I hobbled down to the station to get help, and on arriving there I met the operator and I told him what the trouble was. He immediately discovered that I was hurt, so he got someone else to take me to the hospital, and I don't know exactly who that was, but I heard afterwards that it was the night watchman, and there I was examined, and he taken my side up, it was badly bruised, and he thought [63] perhaps my ribs was broken, and all up and down my right side I was badly bruised, black and blue, and he gave me some pain pills, and it seems like he put me in a room there. I don't have any clear vision of that, and it seems like they moved Mr. Rayburn in there with me and later in the day they moved me to Needles, California, and there I was taken home, and my wife afterwards took me to

(Testimony of Charles Lee Trotter.)

the hospital where they made a thorough examination, so they recommended I go into Los Angeles, to the Santa Fe Hospital for further examination, and that is what took place.

I was held there approximately four days where they examined me and took X-rays, and they released me to go home then, they would not release me to go to work, but they did release me to go home, and I couldn't get no comfort, I was just in constant pain with my back, so the doctor there at Needles, after a few days' treatment there and physiotherapy light treatment, heat pads, why, he says, "You better go back to the hospital again for a further check-up," so I went back to Los Angeles to the Santa Fe Hospital. They put me to bed on boards with just a pad on them, they said that was the cure for an injured back, and they also put me in traction. If you [64] gentlemen don't happen to know what traction is, they took my leg full length and hung a weight over the foot of the bed over a pulley and left me there approximately 14 days, to my knowledge, and I didn't—I didn't get any better. There was no treatment they ever gave me there that ever done me any good. So, after they took me out of this traction they started to give me physiotherapy treatments, and of course that never did do me any good. I still had the bad leg and the pain in my lower back. Well, I got them to release me to go home again and so they recommended that I go ahead and take treatments

(Testimony of Charles Lee Trotter.)

at the local hospital at Needles, which I did. My wife would take me up there each day for these treatments, so I wasn't getting any better in fact, I was worse. My nerves is all upset, I couldn't set still, I couldn't stand up with comfort, or sit down, so I was sent back to the Santa Fe Hospital. That was about the last of June, and at that time I was assigned to Dr. Chafman, and he recommended that I take a leave of absence and get away from everything, he thought probably that would settle my nerves, so I went back to Nebraska, my previous home, and I was there until October, and I came back to Needles then and was there until [65] February, at which time I asked to go back to work. I wasn't getting any better; I had three dependents; I never received no money from any source, I had to have some income of some kind, so I asked to go back to work, so they released me to go to work about February 10th, and they assigned me to a passenger job, which is quite a bit easier than a regular freight job, so that is what helped me out, I could manage to get enough hours in between the runs to carry on my work.

Q. Do you still have trouble with your back?

A. I do, I am in constant pain.

Q. By the way, what wages were you making at the time of this injury?

A. Between 450 to 500 dollars a month.

Q. You were in what service at that time?

A. I was locomotive fireman, I was firing a reg-

(Testimony of Charles Lee Trotter.)

ular, what they call freight pool at the time of the accident.

Q. When you were put back to work you say you were limited to a certain sort of service?

A. Yes, to passenger. I took the passenger job, which was for the comfort of myself. The big passenger engines ride easy.

Q. How long did you continue in that work after [66] you went back to work?

A. I fired a passenger approximately two years after I went back to work.

Q. What were your wages after you went back to work in this special work as compared with the wages you earned at the time of the accident, before the accident?

A. Well, approximately 100 dollars less a month.

Q. Then it was a two year period that you worked? A. Yes.

Q. Did you lose any time during that period?

A. Yes, I did, I laid off a lot. I couldn't get enough rest in between runs to carry on my work like I should.

Q. For the two years, from February 10th, 1945, I believe is when you went back to work, approximately how many days a month did you lose?

A. Well, I'd say four days a month I was off.

Q. As I understand from your testimony, from March 24th, 1944, up until about February 10th, 1945, a period of approximately ten and one-half months, you were not employed?

(Testimony of Charles Lee Trotter.)

A. No, I wasn't. I had no source of income whatever. [67]

Q. You earned nothing?

A. I didn't earn a dime.

Q. If you had been employed during that period of time, you could have earned at least 450 a month?

A. Yes, I could have.

Q. The reason you were not employed was on account of your condition?

A. That is right.

Q. At the time of this injury and the accident that you have related, what was your health at that time?

A. It was good.

Q. Had you ever been affected with lameness or back trouble?

A. No, I never had. I was sound.

Q. What is your age?

A. Now or then?

Q. At that time.

A. At that time I was 40 years old.

Q. Were you a married man?

A. Yes, sir.

Q. Some children?

A. I have two children.

Q. And I believe you stated you lost about a hundred dollars a month for the two years that you went back to work after February 10th?

A. Yes, that is right.

Q. As well as ten and one-half months total loss of wages?

A. Yes, sir.

Q. Now, let's get back to this accident again for a few moments. You say you were on the second

(Testimony of Charles Lee Trotter.)

engine and you looked out? A. Yes.

Q. And you saw this truck?

A. Yes, I saw the truck.

Q. About where, with reference, well, we will say the Tarr-McComb siding at Kingman, the first switch track that ran out to the Tarr-McComb siding, about where do you think it was?

A. I thought it was?

Q. Yes.

A. Well, I knew it was this side of the switches, all right, I knew that.

Q. I see.

A. But that is all I knew, it was this side of the switches.

Q. Which way was the truck headed when you saw it? A. It was headed south.

Q. It was on the track, across the track at [69] that time? A. Yes, it was across the track.

Q. You say you said something to the engineer about to give her the air?

A. Yes, I hollered at him to "big hole it." That is a by-word for emergency application.

Q. At that time did the train slow up?

A. Yes, you could feel it stopping.

Q. And it was the pilot engineer that put on the brakes?

A. No doubt it was, he handles the air.

Q. In any event, the train struck—the first engine struck this truck? A. Yes.

(Testimony of Charles Lee Trotter.)

Q. Do you know whether that truck was carried some distance after it was struck?

A. Well, yes.

Q. Sir?

A. I understood that it was dragged quite a distance before we come to a stop.

Q. You don't just recall that?

A. No, I don't recall it.

Q. When you went around the engine there toward the station, as you relate, after seeing Mr. Rayburn on the ground, you must have passed the pilot engine as well as your own engine? [70]

A. Yes, I did.

Q. Did you notice the truck there hanging on the pilot at that time? A. Yes, I did.

Q. Do you know whether anything was appended to it in the way of a semi-trailer?

A. I knew it was a big truck, but I didn't know what kind.

Q. Now, during or immediately following this injury, at the time of this injury, did you suffer any pain? A. During——

Q. Yes. At the time this injury occurred and you were pinned down between the cab and the——

A. Yes, I did. I screamed out. I knew if the engineer was there he could have heard me. I was pinned in there with no chance of getting out.

Q. Did you afterwards see your sides, the bruises that were on your person?

A. When I was taken to the hospital and stripped down.

(Testimony of Charles Lee Trotter.)

Q. You might tell just how you were bruised and what you, yourself, saw.

A. It started here and bruised down——

Q. By “here,” you mean in the upper right chest? [71]

A. Yes, along the right side and completely along the right side clear down to the right leg to my knee. I saw skin black and blue.

Q. How long did that condition continue on your body?

A. Well, I had a spot on my hip there that lasted for almost a year that I know before it went away, but the other cleared up pretty quick.

Q. Do you still suffer pain from that leg?

A. Yes, I do.

Q. Just what is the trouble with it, how does it affect you?

A. Well, I have just got constant pain there. It is just something tore loose in there, I don't know what it is, but it is just constant hurting all the time.

Q. Where does the pain begin?

A. Well, it starts in the lower part of my back and goes down by right leg to the calf of my leg. It is just like that leg wasn't there, just a one-legged man, that is the way I feel like.

Q. At the place where you struck, where the pilot engine; that is, the first engine struck this truck at Kingman, is there any road across the track? [72]

A. No, there isn't.

(Testimony of Charles Lee Trotter.)

Q. Are you familiar with the location known as—which has been referred to in the testimony as Peggy's Cafe?

A. Well, I have eat there when I was on freight trains.

Q. With reference to Peggy's Cafe, where did this engine strike the truck on the front, if you know?

A. Well, I don't know. I don't know where it would be.

Q. You were traveling westward. Do you recall about what speed the train was making?

A. I'd say 30 miles an hour.

Q. But it was slowing up coming in?

A. Yes, it was slowing up.

Q. Now, do you have any control of the speed on the train? A. I do not.

Q. Because you are on the second engine?

A. That is right, and the fireman, his duties is to keep the engine hot and keep air in it for the engineer.

Q. Who controls the speed of a train of that character when there are two engines?

A. The man on the point, the engineer on the point.

Q. That is the first engine?

A. Yes, the first engine.

Mr. Morgan: You may take the witness.

Cross-Examination

Mr. Struckmeyer, Sr.:

(Testimony of Charles Lee Trotter.)

Q. You say the train was going 30 miles an hour? A. Up to my knowledge, it was.

Q. How? A. To my knowledge.

Q. That is your best knowledge? A. Yes.

Q. That is a very steep grade going into Kingman, is it not?

A. The time card says that it is.

Q. You went back to work on February 10th or 9th, is that right?

A. Well, somewhere around that period, I don't recall.

Q. Well, you remember your deposition was taken? A. Yes, sir.

Q. And you said at that time you went back to work February 9th, but that one day doesn't make any difference.

A. Well, I wasn't right certain. I had it down in my book at home, but I don't have it with me.

Q. Yes. And you were receiving your pay, \$450 to \$500? A. Yes.

Q. What is the exact amount, have you got that? A. No, I have not.

Q. And when you went back to work you did approximately the same duties as you did before, did you not, only in passenger service?

A. I performed the services of a fireman.

Q. Yes, and your pay was about the same as you had received before?

A. Well, I couldn't say that it was.

Q. Well, you said a minute ago in answer to

(Testimony of Charles Lee Trotter.)

Mr. Morgan's question that it was about a hundred dollars less?

A. That is right, I did say that.

Q. Now, in the taking of your deposition, this question was asked you, was it not—well, I will read some preliminary questions so you can get the sense of it.

“Question: Practically the same duties that you did before? Answer: Yes, only in passenger [75] service.” Then this question was asked you:

“Question: Oh, I see. Your pay is increased, then, more than you received on February 24th of last year?” And did you to that question answer: “Well, about the same.”

A. I don't get your question.

Q. The question was this: Referring to your pay, after you went back to work—— “Question: Your pay is increased then, more than you received on February 24th of last year? Answer: Well, about the same.” Did you make that answer to that question?

A. At the time of the deposition?

Q. Yes; that deposition was taken on the 3rd day of April, 1945.

A. I don't remember making the statement.

Q. Well, if that is in your deposition you made that answer and that is correct, you received about the same pay that you received before?

A. Well, I might have received the same pay

(Testimony of Charles Lee Trotter.)

for the kind of work I was doing, but I probably didn't perform as much work.

Q. You kept a memorandum of your exact pay, did you not?

A. Yes, I always kept a memorandum of that.

Q. You haven't got that with you? [76]

A. No, I do not have.

Q. You expected to be asked questions concerning your pay, did you not?

A. I guess that is right.

Q. You were taken to the hospital at Needles at first—no, at Kingman, I mean? A. Yes.

Q. And you stayed there how long?

A. Well, I don't remember just how long they had—

Q. Just a few hours, was it not?

A. No, I was there, it seems to me like, until noon.

Q. How long?

A. Approximately noon before I could—

Q. And that is from after 1:30 when you were taken there up until noon? A. Yes.

Q. And then you were taken where?

A. To Needles.

Q. How long did you stay there?

A. Well, I stayed there over night—not over night, but I caught one of the trains to Los Angeles.

Q. To the Santa Fe Hospital in Los Angeles?

A. Yes, sir.

Q. How long did you stay there? [77]

A. Approximately four days, to my knowledge.

(Testimony of Charles Lee Trotter.)

Q. And that was the regular Santa Fe Hospital?
A. Yes, sir.

Q. And that is where you were treated?

A. Yes, sir.

Q. And then you went back to Needles?

A. That is right.

Q. And went home?
A. That is right.

Q. And stayed home?

A. Well, I was taken every day to the hospital for treatment.

Q. You stayed home, however, you lived at home?
A. Yes, I stayed home.

Q. Where did you live there in Needles?

A. Mariscar Auto Court.

Q. Who paid your rent?

A. I paid it myself.

Q. But when did you go back to Los Angeles to the hospital?

A. Well, I don't remember how long it was before I went back.

Q. Where?

A. I say I don't remember how long it was. I have no account of that whatever. [78]

Q. Well, you were also examined by your own personal physician, Dr. Lopizich?

A. Yes, sir.

Q. When were you examined by him?

A. That was in June, 1944.

Q. 1944, within a few months after the accident?

A. Yes.

(Testimony of Charles Lee Trotter.)

Q. And he found you were also suffering from diseases not relating to any of your injuries?

A. He didn't tell me what his diagnosis were.

Q. But you learned since then that—you learned, and you took medicine for diseases not related to the injury at all?

A. I never took medicine for any diseases.

Q. Did you ascertain at that time you were suffering from prostatitis?

A. He didn't tell me.

Q. He didn't tell you? A. No.

Q. But if he says so, that must be the truth?

A. Well, he was the doctor.

Q. Yes, your own personal doctor?

A. Yes.

Q. You don't know how this truck came on the railroad tracks? A. I do not. [79]

Q. You know nothing about that?

A. I know nothing about that.

Q. By the way, Mr. Trotter, you also have an action pending in California, in the United States Court in California, have you not, for these same injuries?

Mr. Morgan: We object to that as wholly immaterial as to what other actions may be pending.

Mr. Struckmeyer: I think I can show the materiality of it, your Honor, inconsistent claims.

Mr. Morgan: It often happens that there are claims against different defendants.

The Court: Oh, he may answer.

(Testimony of Charles Lee Trotter.)

Mr. Struckmeyer: Q. You have an action pending in California, have you not?

A. Yes.

Q. And that is brought by the same attorneys who have brought this action, not just Morgan, but the other attorneys, being Hildebrand—

Mr. Morgan: We object to all this line of cross examination, it is improper cross examination.

Mr. Struckmeyer: Q. And in fact, in that complaint you allege, do you not, that the fault of this accident was the Railroad Company's fault?

Mr. Morgan: We object to that also as being [80] wholly irrelevant, incompetent and immaterial, and not tending to prove or disprove any issue in this case. If an action arises in regard to the negligence of two or more—

Mr. Struckmeyer: Q. You have a verified complaint here.

The Court: The pleadings are drawn by attorneys and not by the litigants.

Mr. Struckmeyer: Well, I am asking him personally.

Mr. Don Morgan: Can I ask him a question on voire dire?

The Court: Yes.

Mr. Don Morgan: Q. Did you, Mr. Trotter, actually sign this pleading that is referred to by counsel; did you sign and swear to it?

Mr. Struckmeyer: No, it is not so contended. It is verified by his attorney.

(Testimony of Charles Lee Trotter.)

The Court: He is not responsible for what his attorney does.

Mr. Struckmeyer: How is that?

The Court: You can't hold him accountable for what his attorney does, as far as the pleadings are concerned.

Mr. Struckmeyer: Q. You employed attorneys in California for the purpose of bringing an action [81] against the Railroad Company, did you not?

Mr. Don Morgan: We object to that as wholly immaterial.

The Court: I think you have pursued that far enough. It has been answered.

Mr. Struckmeyer: We offer in evidence, if the Court please, a certified copy of the complaint there filed.

Mr. J. H. Morgan: We object to it as wholly incompetent.

Mr. Struckmeyer: May it be marked for identification first?

The Court: Yes.

(The document was marked as Defendants' Exhibit A for identification.)

Mr. Struckmeyer: I think counsel are familiar with it.

The Court: I will sustain the objection on this.

Mr. Struckmeyer: We now offer to prove by this exhibit, then, that the plaintiff in this action has made inconsistent statements as to the cause of the accident, and offer it use it in impeachment

(Testimony of Charles Lee Trotter.)

as to the testimony here as to the cause of the accident.

The Court: Well, by the use of that pleading?

Mr. Struckmeyer: Yes.

The Court: Well, the pleadings were drawn by his counsel. How can you impeach a witness by what his counsel put in a complaint?

Mr. Struckmeyer: I understood that the Court had ruled—

The Court: Well, he said there was an action pending against the Railroad Company. Now, we will let it go at that. If it is a verified pleading, it would be different. Lawyers draw pleadings and their clients never see them.

Mr. Struckmeyer: One more question, your Honor please, in connection with that.

Q. Did your attorneys in California show you a copy of the complaint which had been filed?

A. A copy of what?

Q. A copy of the pleadings that had been filed.

A. No, they have not.

Q. They didn't, but you gave them an answer?

A. All that I had.

Mr. Struckmeyer: In view of the last answer, we renew the offering, if your Honor please.

Mr. J. H. Morgan: The same objection.

The Court: Yes, the objection is sustained.

Mr. Struckmeyer: Q. When did you first see the signal clear or yellow, or whatever you call [83] it, as you approached Kingman?

A. I saw the order board. It was clear.

(Testimony of Charles Lee Trotter.)

Q. Yellow? A. Green.

Q. Green. That was clear? A. Yes, sir.

Q. You didn't see the signal Mr. Rayburn was following? A. No.

Q. Did you see the signal? A. Yes, sir.

Mr. Struckmeyer: That is all.

Mr. Morgan: I believe that is all, Mr. Trotter.

(The witness was excused.)

Mr. Morgan: Mr. Rayburn.

JOHN S. RAYBURN

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. What is your name, please?

A. John S. Rayburn.

Q. Where do you reside, Mr. Rayburn?

A. Needles, California. [84]

Q. Are you the John S. Rayburn who is named as the plaintiff in one of these complaints against the Lightning Delivery Company?

A. Yes, sir.

Q. How old are you at the present time?

A. I will be 51 this coming March.

Q. What was your age at the time of this accident? A. 47.

Q. By the way, at that time what was the state of your health on March 24th, 1944?

A. There was nothing wrong with it that I know of.

(Testimony of John S. Rayburn.)

Q. Had you ever been ill? A. No, sir.

Q. Suffered from no diseases up to that time?

A. No, sir.

Q. How long have you been in the railroad business?

A. I been in active service from November, 1916, until a year ago.

Q. Well, on March 24th you were an engineer, weren't you? A. Yes, sir.

Q. And on the 24th of that year; that is, the 24th of March, 1944, were you an engineer on one [85] of the westbound trains of the Santa Fe?

A. Yes, sir.

Q. On what train?

A. I was on the second engine of a second section of No. 3.

Q. What was your run, by the way?

A. What was my run?

Q. Yes, at that time.

A. I was on the freight pool service and used in extra passenger service.

Q. On this particular day? A. Yes, sir.

Q. Where did you get on; where did you take charge of this second section?

A. At Seligman, Arizona.

Q. And you were driving the train westward to— A. Needles.

Q. Needles. Do you recall that morning of March 24th, what train was preceding you on the track, or do you know? A. I don't know.

Q. You don't know that? A. No, sir.

(Testimony of John S. Rayburn.)

Q. Well, what time were you getting into Needles, I mean into Kingman? [86]

A. Well, we were running late and I don't remember what the orders were, whether we had any time or not.

Q. I don't mean that, I mean what was the actual time you were coming into Kingman, if you remember?

A. About the time we were coming into Kingman?

Q. Yes.

A. Around, oh, 1:20 in the morning.

Q. That was at nighttime, of course, in the morning, 1:20. You were on the second engine?

A. Yes, sir.

Q. Now, being on the second engine, did you have a full view of the tracks all the time, or just at certain times?

A. At a distance, yes, but my view was obscured by the lead engine.

Q. Who has control when there are two engines?

A. The lead engineer has charge of the air.

Q. The lead engineer has charge of the air and the speed, I presume?

A. Yes, sir.

Q. As he speeds up, you speed up the second engine?

A. Yes, sir.

Q. And he puts on the air and the brakes, is [87] that right?

A. Yes, sir.

Q. Will you tell the jury just briefly—I have to ask you to do that because you are familiar with

(Testimony of John S. Rayburn.)

the way the road comes into Kingman, will you tell the jury just how the railroad comes in?

A. Why, you drop down from Louisa Station east of Kingman, downhill and you are coming south and you make a curve to the west, and the lead engineer had made a reduction, I imagine, of 12 or 15 pounds to reduce the speed of the train, knowing that he had to make a station stop at Kingman, and approximately, oh, a mile east of Kingman station, my fireman hollered at me and told me there was a truck on the track, and I leaned out the window and saw it myself, and I come back in to cut into the emergency brake, and the lead engineer had already done so, exhausted his supply of air.

Q. The lead engineer put on the brakes then, or the air, before you had the opportunity?

A. Before I had the opportunity to do so.

Q. That was his duty to do so?

A. Yes, sir.

Q. The train then slowed down?

A. Yes, sir. [88]

Q. Did you continue to observe what was happening?

A. Yes, sir.

Q. All right, go right ahead and tell the jury.

A. Well, I knew we had struck this truck, it was still on the pilot of the engine, and shortly after that we were on the ground and the the engine was lurching and jumping up and down, and I was getting ready to unload; I was standing up with

(Testimony of John S. Rayburn.)

my knees against the window and my hands on the arm rest, and it threw me out.

Q. Do you remember which way it threw you?

A. Threw me out on my head and hands.

Q. I mean, to the right or left?

A. To the right.

Q. There is some buildings there, tool sheds, that you are doubtless familiar with?

A. Yes, sir.

Q. Do you know where it was about, where those tool sheds are?

A. When I came to, oh, a minute or so after I was thrown out of the cab window, why, I think I was by the tool house or where they keep the motor car.

Q. All right, tell the jury what injuries you suffered at that time—before that, let me [89] interrupt. About what height were you thrown, what distance from the cab, out of this window?

A. Approximately 15 to 16 feet from the cab to the ground.

Q. Now, will you please tell the jury what injuries you suffered?

A. Well, I received a concussion, a cut on my head, and both wrists broken, and my right shoulder, right hip and right ankle were badly bruised, and I was taken to the Mohave County Hospital and twelve hours later I was sent to the Los Angeles Hospital on some train that came through, and there I remained for about nine months and a half.

(Testimony of John S. Rayburn.)

Q. How many months?

A. About nine months and a half.

Q. In the hospital in Los Angeles?

A. In the hospital at Los Angeles.

Q. Now, in a general way, what treatments were being given you during that time?

A. Well, my arms were in a cast for six or seven weeks, and during the time I was in there, my right thigh filled up about the size of a football and they had to drain it several times, and then I had physiotherapy.

Q. What do you mean by physiotherapy?

A. Electrotherapy. That is, they had me put [90] my wrists in cold water and then in hot water for so many minutes, and then heat and massage, and then I don't remember, approximately nine months and a half, and I asked the doctor if I could come back to Needles and go to work, and he told me that if I thought I could work, it would be the patriotic thing to do, that they needed men badly, and I came back and I had to pass the book of rules examination which required a week or ten days to fill out and about 1200 questions and answered them orally, and I think I was off ten months and one week, and then I went back to work, and, of course, they had steam and Diesel power, and I couldn't work on steam. It bothered me so much for my injuries, so the local Chairman of the Engineers and also of the Firemen saw the management and they agreed to let me work on

(Testimony of John S. Rayburn.)

Diesels only, which I did do until I had a heart attack last November 4th.

Q. You were laid off for ten and one-half months?

A. Ten months and a week, I believe is correct.

Q. What wages were you making at the time of this accident?

A. At that time during the war the wages ran from six to seven hundred dollars a month, I would [91] say it was a fair average. You could work all that you could stand, and I would say probably six hundred dollars a month would be a fair estimate.

Q. From March 24th, 1944, until you went back to work some time in February, 1945, were you employed in any capacity whatsoever?

A. I don't understand that.

Q. That is, from the date of the accident, March 24th, 1944, until you went back to work, as you have already related, some time in February, 1945, were you employed in any way? A. No, sir.

Q. Nine and one-half months, I believe you said, you were in the hospital? A. Yes, sir.

Q. So that you lost at \$600 a month for that period? A. Approximately \$600 a month.

Q. Now, after you went back to work what were you able to earn?

A. Due to my injuries I could not work very regularly. Just as I felt. If I felt good, I worked, if I didn't, I didn't work.

(Testimony of John S. Rayburn.)

Q. What did you average during the time you did work? [92]

A. Oh, I would say I probably worked ten days a month, 200 to 250, somewhere in there.

Q. Then from February, 1945,—when did you get laid off finally by this heart attack?

A. Until November 4th last year.

Q. '46? A. '46.

Q. That would be how long a period, nearly two years—a year and a half? A. 15 months.

Q. About 21 months, practically 11 months in 1945, and nearly 10 months, or nine months in 1946?

A. I beg your pardon, I thought you were asking when I had this heart condition.

Q. Your heart condition occurred in November?

A. November 4th of last year.

Q. '46, in the year '46? A. Yes, sir.

Q. Since that time, of course, you have not worked, but up until that time you went back to work after this injury about February 1st, 1945, to November, 1946, that would be about 20 or 21 months, wouldn't it? A. Yes, sir.

Q. And what did you earn during that period, how much a month? [93]

A. Well, I haven't the exact figures with me, but I know that it would not run over 250 a month—from two to two-fifty.

Q. Your actual earnings? A. Yes, sir.

Q. If you had been able to work continuously and had not had those injuries, what would you have been able to earn during that period?

(Testimony of John S. Rayburn.)

A. From five to six hundred dollars a month.

Q. You lost around 300 a month?

A. Yes, sir.

Q. These injuries that you have related, did you suffer any pain? A. Yes, sir.

Q. In a general way, what is the character of the injuries?

A. Due to broken bones, I have been told by the doctor that I have an arthritic spine and that caused arthritis, and my hip bothers me, my right hip, and my back at the present time. My wrists are weak, they are sore all the time.

Q. Were both bones in each wrist broken?

A. Yes, sir.

Q. Do you know how long these wrists were kept in casts?

A. I believe that one, my left wrist was in a [94] cast for six weeks, and my right, seven, as I remember.

Q. You still have trouble with one of your hands?

A. My right wrist, yes, sir, more so than the other.

Q. I believe you don't claim your heart condition, that your doctor tells you your heart condition is not related to your injuries?

A. No, the doctor has not committed himself as to that.

Q. Your heart was all right, I take it, before, I think you answered that? A. Yes.

Q. You are a married man? A. Yes, sir.

(Testimony of John S. Rayburn.)

Q. At the present time what are you doing?

A. What am I doing?

Q. Yes.

A. I can't do anything, due to my heart condition. I am on a pension.

Q. How much is your pension?

A. It is \$87.09 a month.

Q. That is all?

A. I also draw \$60 a month from the Government as a World War I veteran. [95]

Mr. Morgan: I think that is all.

Cross Examination

Mr. Struckmeyer:

Q. You were engineer on the Santa Fe from 1916 on?

A. No, sir, I was promoted in 1922.

Q. Oh, I thought you said you worked as a railroad man since 1916.

A. Yes, sir, I did.

Q. For what railroad?

A. For the Santa Fe.

Q. And worked continuously from 1916 until the year—only a few months ago?

A. Yes, sir.

Q. During '16, '17, '18, '19, you worked for the Santa Fe?

A. No, I went in the Service in 1918.

Q. But you did not work continuously for the Santa Fe?

A. No, sir; not during the time I was in the Army.

(Testimony of John S. Rayburn.)

Q. Nine months you were in the Army. Did you sustain any disability? A. No, sir.

Q. Your compensation is what, disability [96] compensation?

A. It is on the World War.

Q. World War I? A. Veteran's pension.

Q. Disability pension?

A. Disability not incurred during the Service.

Q. Not Service connected disability?

A. No, sir; not Service connected.

Q. How long have you been receiving that?

A. Since the first of April of this year.

Q. Since the first of February of this year?

A. First of April of this year.

Q. Of this year. That was after your heart attack? A. Yes, sir.

Q. And you live where?

A. In Needles, California.

Q. You did for awhile stay in Sawtelle, did you not?

A. I was examined there by Government doctors. I had been sent there.

Q. Now, you said you first went in the hospital at Kingman? A. Yes, sir.

Q. And stayed there how long?

A. Approximately 12 hours. [97]

Q. And then you went to Needles?

A. No, sir; I was placed on a train and sent to the Santa Fe Hospital in Los Angeles.

Q. And stayed in the Santa Fe Hospital in Los Angeles how long?

(Testimony of John S. Rayburn.)

A. I believe about nine months and a half.

Q. You were there? A. Yes.

Q. And then did you go back to work immediately? A. No, sir.

Q. When did you go back to work?

A. The early part of February, some time the first part of February.

Q. '45? A. '45, yes, sir.

Q. Now, Mr. Rayburn, your deposition was taken in April, on the 3d day of April, 1945, was it not? A. I beg your pardon?

Q. Your deposition was taken—you testified—your deposition was taken, your testimony was taken in April, 1945, was it not?

A. I don't recall the date. I know it was shortly after I was in the hospital.

Q. And you remember the questions that were

A. Why, I believe that I do, I am not sure. [98]

Q. And this question was asked you—these depositions are sealed, may they be opened?

The Court: Yes.

Mr. Struckmeyer: Both of them. I want to read from the second last page—the third last page: I will read to you preliminary questions: "Question: Yes. You have been back to work? Answer: February the 1st of this year. Question: The same duties? Answer: Yes, sir." For your information, that related to your going back to work?

A. After I had left the hospital in Los Angeles. Some time the first part of February, I don't know the date.

(Testimony of John S. Rayburn.)

Q. And this question was asked you about your work: "Question: The same duties? Answer: Yes, sir." Did you make that answer?

A. To whom does that state I made that answer? I don't know of ever making it.

Q. The question was asked by me at the time—

Mr. Morgan: If the counsel will propound the questions and answers again, I think it will clarify it.

Mr. Struckmeyer: Well, I will read it again: "Question: And are able to perform those duties? Answer: I have been restricted to Diesel power [99] only on account of my injuries." Did you make that answer? A. Yes, sir.

Q. "Question: Receive the same pay as you did prior to the accident? Answer: Yes, sir." Was that question asked you? A. I don't remember.

Q. And did you make the following answer: "Answer: Yes, sir." A. I don't know.

Q. And this question: "Question: And doing the same work practically, except that you are restricted to Diesel power?" And did you make this answer: "Answer: Yes, sir."

A. I know that I was restricted to Diesel power, yes, sir.

Q. But you received the same pay, approximately the same pay as you had before?

A. Yes, sir.

Q. That is correct? Then, during that period that you worked from February 1st, 1945, up until

(Testimony of John S. Rayburn.)

your heart attack, you received approximately the same pay as you had received before?

A. The rate of pay is the same provided you are able to work.

Q. Did you keep a memorandum of the pay that [100] you received?

A. I didn't get your question.

Q. Did you keep a memorandum of the amount of pay you received?

A. All rail men get a copy of your time.

Q. Of your time, yes.

A. And your earnings.

Q. And also prepare income tax returns, did you? A. Yes, sir.

Q. Then you do know how much pay you received?

A. I couldn't quote you that figure, no, because I haven't it with me.

Q. You didn't bring it at all? A. No, sir.

Q. You saw the truck on the track about a mile from the station, is that correct?

A. Approximately a mile, yes.

Q. Approximately a mile?

A. I would imagine that is where I first saw it, somewhere in that vicinity?

Q. And your train at that time, you heard Mr. Trotter testify your train was going about 30 miles an hour?

A. I don't believe that it was that fast. I don't think so, as he had made a reduction in air [101]

(Testimony of John S. Rayburn.)
and reduced the speed of the train.

Q. You do believe that the engineer, the first engineer on the first train, he was going too fast, do you not?

A. No, sir; I don't think so. I knew he had to make a station stop and he had made a reduction of air and slowed the train down preparatory to that stop.

Q. You also filed a suit in California, did you not, against the Santa Fe Railroad Company?

Mr. Morgan: We object to that.

Mr. Struckmeyer: Growing out of these same injuries.

Mr. Morgan: We object to that for the same reason, that it would be no defense whatsoever in this case.

The Court: He may answer.

A. Hildebrand, Bills & McLeod has my case, and what action they have—

Mr. Struckmeyer: Q. But you do know they filed a suit in California, do you not?

A. Yes, sir.

Q. And that suit was filed with your knowledge? and consent? A. Yes, sir.

Q. And do you know on what grounds that suit [102] was based? A. No, sir.

Q. You do not?

A. I am not positive, no, sir.

Q. How is that?

A. I have not talked with the attorney concerning that case.

(Testimony of John S. Rayburn.)

Q. Not since then? A. No, sir.

Q. But you do know that that suit is still pending?

A. I knew that the suit had been filed, yes.

Mr. Struckmeyer: Your Honor please, we offer in evidence a certified copy of the complaint on the same grounds and for the same reason that was stated in the offer on the witness Trotter.

Mr. Morgan: We object to the introduction of that document in evidence for the reasons already stated in connection with the other offer.

The Court: The objection is sustained.

(The document was marked as Defendant's Exhibit D for identification.)

Mr. Struckmeyer: Q. Now, with reference to the questions on cross examination, may we read them in the deposition?

Mr. Morgan: Who answered them? [103]

Mr. Struckmeyer: He said he didn't know what he answered.

Mr. Morgan: Why, certainly.

Mr. Struckmeyer: Then it is stipulated that we may read from the deposition without now stopping—

Mr. Morgan: You have already read it.

Mr. Struckmeyer: Will you stipulate that those were the answers as read by me?

Mr. Morgan: Certainly, yes, yes, the ones you read.

Mr. Struckmeyer: That is all.

Mr. Morgan: Just a question or two.

(Testimony of John S. Rayburn.)

Redirect Examination

Mr. Morgan:

Q. In connection with the pay that you received after you went back to work on February 5th, 1945, you said that you received the same rate of pay. The pay that you received was so much for a trip, is that what you mean, the same rate?

A. The rate of pay is based upon so much a hundred miles, that is the way the roadmen are paid, and the Diesel pay and the steam engine pay is practically the same.

Q. That is on a hundred mile basis? [104]

A. On a hundred mile basis, or ability to work to make the mileage.

Q. So the total amount of your monthly pay would have to take into consideration the number of hours that you can make? A. Yes, sir.

Q. Now, in answer to my question, I think you stated you only made, from this period of February 1st until you were laid up with this heart attack, about \$250 a month, is that right?

A. Approximately, yes.

Q. How did you compute that; how did you arrive at that, that you were paid about \$250 a month during that period?

A. I know about how many trips—

Mr. Struckmeyer: If your Honor pleases—

The Court: He testified to that once, the witness has gone through that on direct examination before.

(Testimony of John S. Rayburn.)

Mr. Morgan: I thought he did, but I wasn't sure.

The Court: Well, I am, there is no need to repeat anything here.

Mr. Morgan: I don't think so except that counsel has brought it up. I believe that is all.

The Court: We will have our afternoon recess [105] at this time, gentlemen. Keep in mind the Court's admonition.

(Thereupon a short recess was taken.)

(After recess, all parties, as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Stockmeyer: To save recalling the witnesses Rayburn and Trotter for one question, I think it is stipulated that no claims are made for hospital and medical expenses?

Mr. Morgan: Well, we make no claim in the pleadings, and we put in no proof.

Mr. Stockmeyer: All right.

The Court: All right.

Mr. Morgan: At this time, if the Court please, I would like to move to amend the complaint to conform with the proof in the following particulars: In the complaint in the Trotter case, Paragraph 9—

Mr. Struckmeyer: May I suggest that counsel type it overnight and we have it in the morning?

Mr. Morgan: It could be done by interlineation.

Mr. Struckmeyer: Oh, all right.

Mr. Morgan: Between the figures \$225 to \$250 per month, just to conform with the proof, \$450 a month. [106]

The Court: All right.

Mr. Morgan: We also reserve the right to allege in the complaint upon proof the reasonable amount of loss of wages or services, but I think that is unnecessary. If it is necessary, we move to amend Paragraph 9 by adding, by alleging that the reasonable value of Mr. Trotter's wages was \$7360, and in the Rayburn case we ask leave to amend the Rayburn complaint to conform with the complaint, or to conform with the proof, and be inserted in Paragraph 9, in lieu of \$500 a month, the figure of approximately \$600 per month, and by adding to Paragraph 9 of the complaint, that the reasonable value for the loss of Mr. Rayburn's wages was \$13,000, or is \$13,000.

The Court: All right. Call your next witness.

Mr. Morgan: We wish to put on the deposition of Dr. Lopizich. I think the original deposition is on file, is it not?

The Clerk: Yes.

Mr. Don Morgan: If the Court please, we would like to have Mr. Brobst to be the witness, and I will read the questions to him, and we get to Mr. Struckmeyer's questions, he will read his questions.

(Thereupon the deposition of Ival J. Lopizich taken in the case of Charles Lee Trotter versus [107] Lightning Delivery Company, et al., Civil 112, Prescott, commencing at 4:00 o'clock p.m., on

the 15th day of December, 1947, in the City of Los Angeles, California, was read.)

The Court: All right, now they have rested. Call your first witness or make your statement.

Mr. James Struckmeyer: We have a short motion at the present time, your Honor.

The Court: All right, do you want the jury to leave the courtroom?

Mr. Struckmeyer: No, I don't think so, I believe we can make it at the Judge's bench.

The Court: All right.

(Thereupon the following motion was made at the bench without the hearing of the jury:)

Mr. James Struckmeyer: Come now the defendants and move the Court that the Court do dismiss the action of the plaintiffs and direct a verdict in favor of the defendants, on the ground and for the reason that the plaintiffs have failed to establish any negligence whatsoever on the part of the defendants which would justify the jury in returning a verdict for the plaintiffs, and have failed to establish any act of negligence upon the part of the defendant in the operation or conduct of his trucks.

The Court: Is that all?

Mr. James Struckmeyer: That is all.

The Court: The motion is denied.

Mr. Struckmeyer, Sr.: I think we can save time by recessing until morning.

The Court: How can we save time?

Mr. Struckmeyer, Sr.: By getting our witnesses in shape and getting through, one, two, three.

Mr. James Struckmeyer: Let's go ahead.

The Court: All right, one half an hour.

DEFENDANTS' CASE

CHARLES W. DRYDEN

was called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct Examination

Mr. Struckmeyer, Sr.:

Q. State your name, please.

A. Charles W. Dryden.

Q. What is your profession?

A. I am a civil engineer, Registered Civil Engineer.

Q. Practicing your profession in the State of Arizona? [109]

A. Yes, sir.

Q. At the request of Mr. Christensen did you make a map or drawing of Kingman, Arizona, where this accident occurred—you have been in the courtroom?

A. Yes.

Q. Where this accident occurred concerning which there has been testimony given here.

A. I did, right in the immediate local vicinity there.

Q. Have you such a map?

A. Yes, I have.

Mr. Struckmeyer. Will you produce it, please?

(Testimony of Charles W. Dryden.)

(The document was handed to Mr. Struckmeyer by the witness.)

Mr. Struckmeyer: Now, when was this map made?

A. It was made October 7th, 1944.

Q. And who was with you at the time you made it—did you take anybody's directions?

A. No, I made it under my own initiative at the request of Mr. Christensen.

Q. Yes.

A. And I believe that there was certain things that were to be shown, like the elevations, different elevations to be shown.

Q. State what that map shows, describe it in [110] general so that the jury may understand it.

A. Well—

Q. I will have it marked for identification and offer it.

Mr. J. H. Morgan: You are offering it?

Mr. Struckmeyer: I am offering it, yes.

Mr. J. H. Morgan: As an exhibit?

Mr. Struckmeyer: Exhibit C in evidence.

Mr. J. H. Morgan: When did you say this map was made? A. October, 1944.

Q. It was several months after the accident?

A. Yes.

Q. The various points that you have indicated on the map, such as where the truck was parked here, the point of collision, and so forth, were pointed out to you at that time?

(Testimony of Charles W. Dryden.)

A. They were pointed out to me at the time I made the map.

Q. Several months after the accident?

A. Several months after the accident.

Q. You don't mean by presenting this map that the truck was actually located where you say it was, but just simply where somebody told you?

A. Just simply information I obtained when I was making this survey indicating that point. [111]

Mr. J. H. Morgan: I think we will object to it because—on the ground that this simply shows what somebody pointed out to him at a much later date.

Mr. Struckmeyer: It is not primarily offered for that purpose. It is offered for the purpose of showing the grade, the location and the dimensions, your Honor, and the distances.

Mr. Morgan: Well, those he can testify to, use the map for that purpose, but not introduce it in evidence.

The Court: Well, any part of the map that is based on hearsay, of course, would not be admissible.

Mr. Struckmeyer: No, no, we don't offer that. These objects that are marked here were simply information which you received, and you do not vouch for their accuracy? A. No.

Mr. Struckmeyer: And this map does not pretend to.

The Court: Well, let him use it to illustrate his testimony, then, and we will get at it that way.

Mr. Struckmeyer: All right.

(Testimony of Charles W. Dryden.)

Q. Now, will you step down before the jury [112] and illustrate your testimony and the map itself from the map. You may step down.

Mr. Morgan: Is the map in now?

The Witness: This map shows the elevation of the railroad tracks—

Mr. Struckmeyer: Just a minute. To avoid any confusion, may the jury be instructed to disregard the map where the truck was parked. That is the only thing on there, your Honor, that is where the truck was supposed to have been parked.

The Court: That is the only thing based on hearsay?

Mr. Struckmeyer: That is the only thing based on hearsay, and the rest of it, all of this map was prepared by your actual measurements?

A. That is right.

Q. So far as the grades and distances are concerned? A. That is right.

Mr. Struckmeyer: All right, we offer it for that purpose only.

The Court: All right, it may be received.

(Thereupon the document was received as Defendants' Exhibit C in evidence.)

The Witness: Now, what particularly do you want me to show the jury? [113]

Mr. Struckmeyer: I want the measurements and the elevations, and referring to this place here where you were informed it was parked, why, that is not your evidence, that is merely for purposes of illustration.

(Testimony of Charles W. Dryden.)

A. That is right. Well, this cafe where the driver stopped is about 150 feet from this little filling station here, and then there is another, about 50 or 45 feet to the corner of this street where Seventh Street intersects with this Front Street, it is called over there. It is really U. S. Highway 66, and this area indicated, dotted in, is practically all level, it has all been graded down and oil surfaced. This runs about a hundred feet to the corner where that mark is there, 100.08 there, 101.25 there, and then at this corner of the building, 101.63, there is a little, slight slope that way, and right here immediately in front of the station it is about 100.98, almost 101 feet, and over here a little further, 101.42—

A Juror: Where is the cafe?

A. The cafe is in this block 13 there (indicating on map).

Mr. Struckmeyer: Just one question: So far as the location of the cafe is concerned, these [114] are actual measurements made by you?

A. That is right. Now, this elevation out here, coming down this street, starts at 101.15 down to 99.95, 97.92, and down here is where the streets intersect, that is 96.66, and coming down this way the ground falls off quite rapidly. Down the center of the street you see this 93.8 down here. That is a drop of almost three feet in about 75 or 80 feet, and coming down further down it is 91.49 and then 90.26. As you go this way it drops off quite rapidly and drops off this way (indicating on dia-

(Testimony of Charles W. Dryden.)

gram). On the railroad track down here the elevation is 89.06, which makes it about seven or almost twelve feet lower than this area in here. Then the elevation here between these tracks is steep, because the elevation is 88.46 in between here. On the track here, the center of it is 89.06, and then over here on this other rail, 89.14. This is fairly level between those spaces with a little swale in between, about a foot difference in elevation. From this point here to the filling station, it is 295 feet directly across, straight across. Is there anything else?

A Juror: What is the elevation of the cafe there? [115]

A. After you come up here, then this is all about the same, and the elevation at the corner of that building is 102.01, so it would be approximately 102. There is a right of way on U. S. Highway 66, 50 feet on each side of the center line. I notice there is a couple of encroaching structures here up on the highway right of way. Any questions on my answer?

A Juror: Could I see that?

(The witness hands the map to the juror.)

Mr. Struckmeyer: No further questions.

Cross Examination

Mr. J. H. Morgan:

Q. Will you please mark on your Sketch A at the corner of the cafe, the west front corner of the cafe that you have marked here?

A. Mark it "A"?

(Testimony of Charles W. Dryden.)

Q. Yes, just for use.

(The witness complies.)

Q. Now, will you mark a "B" which you have designated as the point of collision?

(The witness complies.)

Q. Now, with respect to the passing track, you were on the ground, I presume? A. Yes.

Q. That is the Santa Fe track which, the passing switch, the throw-off switch, where is that?

A. It is about in here (indicating on map).

Q. What would be the difference in the elevation from the point "A" which you have marked at the corner of the cafe, and point "B," the point of collision of the truck?

A. It would be 12.95 feet.

Q. Almost 13 feet? A. Almost 13 feet.

Q. What is the difference in the elevation from the corner of the, what you call the garage?

A. Yes.

Q. Is it a garage?

A. Yes, sir. This is the garage here, this is the cafe, and this is the filling station (indicating on map).

Q. The filling station is how many feet?

A. 11.92 feet.

Q. I notice you have a star mark down in front of this garage.

A. It indicates the position where I took the elevation.

Q. Oh, I see. Now, 50 feet on each side of the

(Testimony of Charles W. Dryden.)

center line which you have designated as [117]
U. S. 66 would be about where on your map?

A. Right here (indicating).

Q. The line is shown——

A. The line is shown on both sides.

Q. Yes, sir. The paved portion doesn't go out?

A. No, the paved portion is narrower, much narrower than the 100 feet of right of way.

Q. You are familiar with the contour of the way the ground slopes and rolls? A. Yes.

Q. And went over it to that extent?

A. Yes.

Q. Now, if a car, a truck was parked somewhere in the vicinity of what we call the cafe here, which I presume you mean is Peggy's Cafe at that time?

A. Yes.

Q. Is parked there and got loose for some reason and started rolling, was headed west and started rolling down the hill, what way would it roll—would be likely to roll?

A. Well, the ground slopes this way and this way (indicating on diagram).

Q. Yes, sir.

A. Now, at the edge of this roadway here there is a little dip down where the storm water would normally drain, and right in here, of course, it is difficult for me to say which way it would roll, but probably would roll down this way, and as it came it would turn, gradually turned and came this way (indicating).

(Testimony of Charles W. Dryden.)

Q. Turned to the south?

A. Turned to the south, yes.

Q. Toward the railroad track?

A. That is a presumption on my part because I am just guessing that is the way it would do, because the hill slopes that way and slopes this way.

Q. From the corner of what is known as Peggy's Cafe to the point where you have marked the point of collision on the plat, what is the distance?

A. It is 295 feet from here to here, and from here it is 50—100—100 more feet. You see, these are each 50 foot lots, 50, 100 to that point, and approximately——

Q. Approximately 395 feet? A. 395 feet.

Q. And 13 feet higher? A. 13 feet higher.

Q. Handing you your plat again, Defendants' Exhibit C in evidence, I will ask you particularly concerning the ground in and around what you have [119] designated as the parking station, how does the ground there slope?

A. Well, it is very nearly level. It is 101.63, 101.42 and 100.98, 101.95. You see, it is all down-graded in there and it was surfaced. It is the driveway yard for the filling station and the property line is right along the front line of that gasoline——

Q. And right on the line of the right of way?

A. Yes.

Mr. Morgan: All right, I think that is all.

Mr. Struckmeyer: That is all.

(The witness was excused.)

The Court: We will suspend at this point until ten in the morning. Keep in mind the Court's admonition and be back at ten o'clock.

(Thereupon a recess was taken at 4:25 o'clock, p.m.) [120]

December 31, 1947, 10:00 o'clock a.m.

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: You may call your next witness.

Mr. Struckmeyer, Sr.: Mr. Wilson.

CONDA WILSON

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

Mr. Struckmeyer:

Q. Will you state your name, please?

A. Sir?

Q. Your name? A. Conda E. Wilson.

Q. Where do you live?

A. Flagstaff, Arizona.

Q. How long have you lived there—how long have you lived there? A. About 14 years.

Q. What is your vocation or business?

A. Sir?

Q. What has been your work? [121]

A. In Houston, Texas.

Q. No, what do you do for a living?

A. Oh, a truck driver.

(Testimony of Conda Wilson.)

Q. You have been a truck driver for how long?

A. About 15 years altogether—about 13 in Arizona.

Q. And by whom have you been employed the last few years?

A. I started out with the Lightning Delivery Company when I first come to Flagstaff.

Q. 14 years ago? A. Yes, sir.

Q. And have you been in their employ ever since?

A. Ever since. The Company kept changing hands and I went right with the Company.

Q. For the last seven years you have been employed by Frank Christensen?

A. I was about five years with Frank Christensen.

Q. Now, in March, 1944, particularly March 24th, you were working for Frank Christensen?

A. Yes, sir.

Q. On that date did you make any delivery of anything—what did you haul that day?

A. I was hauling sheep that day to Kingman.

Q. To Kingman? A. Yes, sir. [122]

Q. And from where?

A. From Cameron, Arizona.

Q. And there was an accident there that day. Now, without going into details of that accident, before you had completed your delivery—you had made your delivery of the sheep?

A. Yes, sir.

(Testimony of Conda Wilson.)

Q. And that was a little bit west of Kingman?

A. After I delivered my sheep I delivered about 12 miles on the other side of——

Q. Yes. What did you do after you delivered your sheep?

A. Back into Kingman about 12:30 or a quarter to one, and I was pulling in the east.

Q. You were going east then?

A. That is right.

Q. Going back where?

A. I turned around and headed back west and parked in front of the Associated Service Station.

Q. What were you going to do in Kingman that night?

A. I stayed there for about five minutes waiting for the other truck to come in, and when he come in, I walked across the highway and I talked to him a few minutes.

Q. Why did you stop in Kingman? [123]

A. About 12:45.

Q. Why? A. Why?

Q. Yes.

A. Well, we generally get a cup of coffee there and after we parked one truck he took my truck and went down town to get a bed.

Q. Then you were going to stay over that night?

A. Stay over night and go back the next day.

Q. Now, you have seen this map, have you, referring to Defendant's Exhibit No. C, referring to

(Testimony of Conda Wilson.)

this map, have you seen that map; did you look over that map? A. Yes, sir.

Q. All right. You were in the courtroom yesterday, were you? A. Yes, I was.

Q. When another witness drew a map on this board? A. Yes, sir.

Q. You could not hear the testimony very well, you were sitting——

A. I heard most of it, yes, sir.

Q. Referring to this diagram on the board here, is there any—you may step down if you wish to, or turn around. All right. This “B,” that is [124] Peggy’s Cafe? A. Yes, sir.

Q. And “A”? A. Is the garage.

Q. And this place over here?

A. That should be the service station.

Q. The service station? A. Yes, sir.

Q. Now, where were you parked there with reference to that service station?

A. Right in front of the gas pumps on the outside next to the highway, but there was a sign, there was in the distance between the highway and the pavement where you drive into the gas station. The reason I didn’t drive in the inside, there was a little roof over the inside of the plant and I couldn’t get in there with the semi, and I pulled over on the outside so the light will reflect down in my motor when I checked my oil.

Q. That is why you stopped there to check your oil?

(Testimony of Conda Wilson.)

A. Always check the oil and gas when you stop. That was the main reason.

Q. Then referring to this map, Exhibit C, can you point out there without paying any attention to this line here or this mark drawn on there, [125] without paying any attention to that, can you point out where you were parked?

A. Right there where the X is.

Q. Show it to the jury.

A. Right there where the X is. This is the roof over the front end of the service station out in the first part of the service station where you drive in under a pump. There was a gas pump right in here and I parked right next to it, to the outside gas pump.

Q. What were you going to do with your truck, were you going to leave it there for the night?

A. No. After we had a cup of coffee—

Q. Well, what were you going to do, were you going to leave it there? A. When I parked?

Q. Yes.

A. I stopped there to check my oil and tires before we left again.

Q. Was that a regular parking place for trucks or cars?

A. Yes, when they are gassing or checking oil or anything, yes, sir, that is what that place is for.

Q. Then what did you do after you did that, after you parked your car there? [126]

A. A. Well, I sat there and waited for the

other truck, because he was having troubles and I told him I would go on in and if he didn't come in within a certain length of time I would come and get him.

Q. Where had he been, west of Kingman?

A. No, he was unloading sheep too.

Q. I see. He had been with you unloading sheep?

A. Yes, sir. I passed him and come on into town.

Q. You waited there for him?

A. I waited there for him.

Q. What was his name?

A. His name was Leonard Gore.

Q. Now then, how soon did he drive up—how soon did he drive up after you parked there?

A. About five minutes.

Q. All right. Did you talk to him—don't state what he said, but did you talk to him there?

A. Yes.

Q. All right, then what did he do?

A. He checked his truck while I was waiting for him.

Q. At the service station?

A. No, sir, he was across the road, he was headed east. [127]

Q. Headed east. All right. Now, can you point to this diagram on the blackboard and state where he parked his truck?

A. He parked about right there on the right hand side of the highway going east (indicating).

(Testimony of Conda Wilson.)

Q. Will you put a mark there?

A. Yes, sir (complying).

Q. Mark that, just put an X there.

(The witness complies.)

Mr. Morgan: Well, in all fairness to the witness Mr. Struckmeyer, he is evidently confused with the diagram. He said it was on the right hand side of the highway going east.

Mr. Struckmeyer: That is correct.

Mr. Morgan: Well, he is on the left hand side of the highway going east.

The Witness: This is the highway, huh?

Mr. Struckmeyer: Yes.

Mr. Morgan: Yes.

Mr. Struckmeyer: That is right. Thank you. All right, you have marked that on the blackboard, the other truck? A. Yes, sir.

Q. Now, also on this map, Exhibit C, can you point out to the jury where he was parked, where he parked his truck? [128]

A. This is the highway, this is the highway, isn't it?

Mr. Struckmeyer: Yes, that is the highway.

Mr. Morgan: No, this is the center line.

Mr. Struckmeyer: That is the center line.

The Witness: Well, he was parked about right in here. There is the oil station, I mean, the place where—the oil plant over there, and he was parked between the highway and the oil plant, I'd say about, oh, 15 or 20 feet off the highway.

(Testimony of Conda Wilson.)

Q. Can you put that on the map there?

A. (Complying.)

Q. Now, in that—on the right—on the right there, you have drawn—

A. The other truck.

Q. The other truck. That is all marked there?

A. Yes, that is right.

Q. That is where he was parked?

A. Where he was parked.

Q. Then what did you do?

A. Why, after he got done checking his oil, we went into Peggy's Cafe, I think that is the name of it, got a cup of coffee and a piece of pie.

Q. Was the other driver, did he come in there too? [129] A. Sir?

Q. The other driver, did he come in there too?

A. He went right in with me.

Q. Went in with you? A. Yes.

Q. How long did you stay there?

A. Well, about ten, between ten and fifteen minutes, not over fifteen minutes.

Q. Now, after you parked your truck what did you do with your truck?

A. First turned off the key, checked to see if it was in gear, had three gearshifts, had three gearshifts on it, I pulled on the air brake lever, had to use that to stop with, and then I checked to see if it was in gear and then pulled on my emergency brake and I sat and waited for the other truck.

(Testimony of Conda Wilson.)

Q. Was that all that you could do; did you do everything that you could do with the truck?

A. That is right.

Q. And that was the regular way of parking it?

A. That was the way I always parked my truck.

Q. Well, you have seen other truck drivers, you know that business, don't you? A. Sir?

Q. I say you know that business, the trucking business? [130] A. Yes, sir; I should.

Q. Now, could that car have moved away from there of its own motion, your truck?

A. No, sir.

Q. Could not?

A. Could not move without a push. It either have to be out of gear or the brakes off.

Q. You did everything that could be done, did you not, to make sure that it stayed there?

A. I did, all but getting out and hunting a rock to block the wheel.

Q. Yes. Then, go ahead from there when you were in the cafe, you were in there about ten or fifteen minutes? A. Right, sir.

Q. All right, then what did you do?

A. We started out back through the door and I looked over and a bus had pulled in the back of my truck, some bus from out at the airport, I looked around it and I said to the other boy, "Somebody stole my truck."

Q. The bus had pulled in behind your truck?

A. Yes, sir.

(Testimony of Conda Wilson.)

Q. That is, which way from your truck, east?

A. He come from the east, yes, sir. [131]

Q. And he pulled in behind your truck?

A. Right, sir.

Q. All right, then go ahead from there on.

A. I said, "Somebody stole my truck," and they said, "Oh." I said, "It isn't over there where I parked," so I thought maybe the service station man come in and wanted in the service station or something, and had moved it, so I walked around the side of the service station to see if my truck was parked any place on the other side and it wasn't parked there. By that time, Mr. Gore went some place across the highway and I turned around and started to come to the cafe to start the law—to tell them my truck was missing, and about the time I got to the door somebody else walked up and said to me that there was a train wreck, or looked like a train wreck, so I turned around and started towards the railroad to see what happened out there, and they had the engineer laying on the ground and was talking. Anyway, I asked what happened, and somebody said the passenger train hit a truck, so I walked around in front of the train and there lay my truck.

Q. What was said—did you examine it at the time?

A. I just looked in the—the door was open, I just looked in the door, that is all.

Q. The door was open?

(Testimony of Conda Wilson.)

A. On the right side. The impact probably knocked the door open. Maybe it was open otherwise, I don't know.

Q. You don't know how it opened?

A. I don't know how it was opened, but it was standing open.

Q. How about the gears, did you examine them at that time—did you examine the truck—about the gears?

A. All I looked at was the air brake and emergency, that is all. I didn't get close to it, they told me to stay away until the law looked it over.

Q. Do you know whether or not the emergency, the air brake had been released?

A. I could see—you mean do I know whether it had been released?

Q. Yes.

A. They was on anyway.

Q. When you parked it, but I mean afterwards.

A. I mean, when I looked in the door, when the door was open I could tell the emergency brake was pulled up and also the air lever down.

Q. Did you go back the next day? [133]

A. Back where?

Q. Did you stay there that night?

A. No, we had to stay there that night.

Q. Yes. Were you there the next day; did you examine—

A. After the law come and looked it over, I looked back in it, and the Brownie in the regular trans-

(Testimony of Conda Wilson.)

mission all seemed to be in gear when I looked at it the second time.

Q. Did you stay there—did you go over it with Mr. Christensen the next day?

A. Over where?

Q. Did you go over and see the truck again with Mr. Christensen the next day?

A. We stayed until they got the truck off the track and then I went home with Mr. Christensen. We went down first to the hotel and Mr. Gore called Mr. Christensen.

Q. That is what I mean, Mr. Christensen was not there at the time? A. No, sir.

Q. But he came? A. He was in Flagstaff.

Q. And he came right up? A. Yes, sir.

Q. I see. [134]

A. As soon as he was notified, he come right up. Mr. Struckmeyer: Cross examine.

Cross Examination

Mr. Brobst:

Q. Mr. Wilson, you state that you have been a truck driver for fifteen years?

A. Yes, sir; altogether.

Q. Now, the night that this accident happened, you did go into Peggy's Cafe and get a cup of coffee? A. What time?

Q. The night that the accident happened, you actually went into Peggy's Cafe and got a cup of coffee?

A. What happened, you mean? Or what time?

(Testimony of Conda Wilson.)

Q. You went into Peggy's Cafe and got some coffee, the night the accident happened?

A. Yes, sir.

Q. And the truck that was down on the railroad track when you got down there was the truck that you had parked, as you say, up at the service station?

A. That is right, sir.

Q. There is no question about that? [135]

A. Sir?

Q. There is no question but what it was so parked?

A. No, sir; it was the truck I was driving.

Q. Now, you had delivered your sheep and when you were on your way back to where, was it Flagstaff?

A. Yes, sir.

Q. And you planned to have coffee and then stay there at Kingman that night?

A. That is right.

Q. And you had brought someone back with you from—or someone had followed you, rather, in another truck, is that correct?

A. The other truck was following me, yes.

Q. What did you say that man's name was?

A. His name was Leonard Gore.

Q. All right. Now, when you stopped there at the service station, were the lights on, was it lit?

A. Was it what?

Q. Was it lit up; were the lights on in the service station?

A. No, sir; it was closed up.

Q. It was closed? A. Yes, sir. [136]

Q. I don't quite understand. You say you

(Testimony of Conda Wilson.)

stopped where there was a little gully so you could get under and look at the oil.

A. Well, the top light, that is on all the time in the service station.

Q. Was the top lighted when you parked?

A. Yes, the big light was on, the main street light.

Q. Now, as far as this diagram is concerned, would you just put an X so that we can all see it where you say that you parked your truck?

A. Is it all right to change this?

Q. No, don't change it, put an X—disregard those things.

A. (Complying): This is where my tractor was parked. This is the front end of the truck, the tractor part and trailer back through—back next to the opening between the two buildings.

Q. All right, I will mark these two small marks that you have here as W-1 on that diagram, and that indicates the way your tractors and trailer were parked?

A. Sir?

Q. That is the way your truck and trailer were parked?

A. It was headed west. [137]

Q. Headed west?

A. Yes, sir.

Q. Now, Mr. Wilson, when you parked it there you said you put it in gear?

A. Yes, sir.

Q. In what gear did you put it?

A. Well, the Eaton was in overdrive, and the Brownie, I believe, was in overdrive.

Q. They were both in forward overdrive?

A. Yes, sir.

(Testimony of Conda Wilson.)

Q. And you also removed the ignition key?

A. Pardon?

Q. You removed the ignition key, you removed the key from the ignition? A. No, sir.

Q. You left the key in?

A. I left the key in the ignition.

Q. You left the key in the ignition and you left it in gear? A. Yes, sir.

Q. All right. Now, Mr. Wilson, you left the key in the ignition and you left the gear in over-drive forward in gear? A. Yes, sir.

Q. And you left it parked so it was facing in a westerly direction. That highway slopes westerly [138] down towards Kingman on a grade—the highway slopes in a westerly direction towards Kingman? A. Yes, sir.

Q. Now, in addition to that you put on your air brake? A. Pulled on the air brake.

Q. You put on your air brake?

A. I set the air brake before I even tried anything else.

Q. Well, you set the air brake?

A. Yes, sir.

Q. And you pulled on the mechanical brake?

A. The emergency brake, yes, sir.

Q. Emergency brake, and that is all you did there, and those are all the things that you did, I want to get them all. You had the two gears in gear; you left the ignition key in?

A. Yes, sir.

Q. And you set the air brake?

(Testimony of Conda Wilson.)

A. Yes, sir.

Q. You set the mechanical brake?

A. Yes, sir.

Q. And then you left your truck?

A. No, sir.

Q. Well, what did you do after that?

A. I stayed in my truck for about five minutes
[139] waiting for the other truck.

Q. Then you got out and left it there?

A. Yes, sir.

Q. And that is all you did with reference to
parking your truck? A. Yes, sir.

Q. Then after you had had your coffee you came
out of the restaurant—after you had had your coffee
and pie you came out of the restaurant?

A. After I came out of the restaurant—did you
say after I came out of the restaurant?

Q. Yes, after you drank your coffee and after
you ate your pie, then you came out of the res-
taurant? A. Right, sir.

Q. When you came out of the restaurant you
discovered your truck was gone?

A. That is right, sir.

Q. And when you went down to the railroad
track—you later went down to the railroad track
and saw your truck? A. Yes, sir.

Mr. Brobst: All right, that is all. [140]

Redirect Examination

Mr. Struckmeyer:

Q. The fact that you are hard of hearing does
not interfere with your driving at all?

(Testimony of Conda Wilson.)

A. No, sir.

Q. Did you receive any medals for safe driving?

A. Yes, sir; I received a medal for three years' service—

Mr. Brobst: Object as immaterial.

Mr. Struckmeyer: It is only in view of his somewhat hard of hearing, your Honor please.

The Court: Well, that wouldn't affect one's skill as a driver.

Mr. Struckmeyer: All right.

Q. Now, is it usually customary for trucks after parking like that to leave the key in the—leave the keys in? A. Leave the keys in the car.

Q. Is it usual and customary for trucks?

A. Well, when you are just off for a couple of minutes we never bother taking the keys out of the ignition. We only figured on staying long enough to get coffee. I never take the keys out.

Q. Do other truck drivers take the keys out?

A. Everyone I have been with don't, just to get coffee. [141]

Q. I think I asked you before, from the way you parked your truck there it was impossible to move of its own motion unless somebody else had interfered with it? A. That is my belief.

Mr. Morgan: I object to the answer, your Honor. That is a matter for the jury to determine.

The Court: Yes.

Mr. Struckmeyer: All right, that is all—just one question—go ahead.

(Testimony of Conda Wilson.)

Recross Examination

Mr. Brobst:

Q. I will try once more, I just want one question, I want to mark on this map one that corresponded to this one. Where on this map would you say that your truck was parked?

A. Right there.

Q. Right where the X is here?

A. Yes, sir.

Q. Mr. Wilson, did you have a conversation with a police officer, a State Highway Patrolman, following the accident? A. Following what?

Q. After the accident, did you have a conversation with a police officer, a State Highway [142] Patrolman? A. Did I make—

Q. Did you have a conversation with a State Highway Patrolman after the accident?

A. Yes, sir, I made out my accident report.

Q. And at that time didn't you tell him that the reason that the truck got away was because the air brakes might have leaked? A. No, sir.

Q. You didn't tell him that? A. No, sir.

Q. And also isn't it a fact that you told him there that you weren't sure what gear you put the levers in?

A. That was only in one gear. I didn't know whether it was the regular transmission or in first or second gear.

Q. But you didn't tell him that the reason the truck got away was because the air brakes might have leaked? A. No, sir.

(Testimony of Conda Wilson.)

Mr. Brobst: All right, that is all, your Honor.

Redirect Examination

Mr. Struckmeyer:

Q. You had driven that day, I believe, from Cameron to Kingman? A. Yes, sir.

Q. And on very heavy grades?

A. Lots of heavy grades, yes, sir.

Q. And your air brakes on that day, they were tested, of course?

A. I had no trouble with my air brakes, never.

Q. They were in good condition?

A. No, sir.

Q. I say there were in good condition?

A. Yes, very good.

Recross Examination

Mr. Brobst:

Q. Do you recall what year this truck was made, what year model was this truck? A. Sir?

Q. What year model was this truck?

A. What year?

Q. Yes. A. I think it was '39.

Q. And how many miles had it been driven up to the time that this accident happened? [144]

A. That is hard to say.

Q. You don't know?

A. I have hauled to Kingman for over a month steady.

Q. You don't know the actual mileage of the speedometer? A. No, I don't.

Mr. Brobst: That is all.

(The witness was excused.)

Mr. Struckmeyer: Mr. Christensen.

FRANK L. CHRISTENSEN

was recalled as a witness in his own behalf, and having been duly sworn, testified as follows:

Direct Examination

Mr. Struckmeyer:

Q. Mr. Christensen, this truck that was involved in that accident, what make was it?

A. It was a Ford, what we call a built-up Ford, having had a heavy duty front end, Brownie-Eaton with Mercury motor, with 920 rear, $8\frac{1}{4}$ -20 in the front and 920 drive on the trailer.

Q. What condition was the truck in at the time?

A. At that time I don't know, but at the time that it left Flagstaff it was in perfect condition.

Q. That is what I mean, at the time it left Flagstaff.

A. Yes, sir.

Q. What condition was it?

A. Perfect condition.

Q. Do you know the mileage?

A. No, sir; I don't there is any truck driver knows the mileage on his trucks.

Q. You, yourself, are a truck driver?

A. Yes, sir.

Q. Have been for how many years?

A. Yes, sir—Oh, I started to drive in '16 and I am still driving; that is trucks and passenger cars both.

Q. Trucks and passengers?

A. Yes, sir.

(Testimony of Frank L. Christensen.)

Q. And was the truck—was that truck examined before it left Flagstaff?

A. Yes, sir; it was examined the afternoon before it left Flagstaff.

Q. By whom?

A. By Ed Babbitt Motor Company.

Q. That is the Babbitt Motor Company in Flagstaff?

A. Yes, sir.

Q. What condition was it then? [146]

A. It was checked. I just put a new motor in it and it was checked for brakes, air, and for any leaky gaskets or felts on wheels so it would affect the brakes, and we had the motor tuned up and had the brakes checked that afternoon before it left.

Q. Do you know the condition of the checking?

A. Yes, sir.

Q. And in what condition was it?

A. Well, just as good condition as a truck could be in.

Q. Now, you heard your driver testify about parking there?

A. Yes, sir.

Q. Is it the usual and customary manner of parking?

A. After unloading, yes, sir.

Q. After unloading, yes, yes. Now, something was said about leaving keys in the truck.

A. Yes, sir.

Q. What do you know about that?

A. Only this, that I have one 1940 Dodge, the one that was with this equipment, still in my service, and I don't think I could get the key out of it.

(Testimony of Frank L. Christensen.)

Q. Well, is it customary to leave the key in [147] the truck? A. Yes.

Q. You heard him testify about setting the brakes and everything that he did?

A. Yes, sir.

Q. Is it usual and a customary manner of doing, of parking a truck?

A. I think that is second nature with the truck driver.

Q. So that from your own knowledge of trucks, and this particular truck and driver, was there any way that that truck of its own motion, could move away from there?

A. Not a possible chance in the world.

Q. Unless there was some outside interference?

A. That is right.

Q. You never learned what that was?

A. No, sir.

Q. They telephoned you and you went there that night?

A. Yes, sir; they called me about, I think it was about a quarter to two. I left Flagstaff about 2:15. I was in Kingman between seven and seven-thirty.

Q. And you examined your truck the following day? [148] A. Yes, sir.

Q. In what condition did you find it with reference to the gear?

Mr. Morgan: Oh, if your Honor please, I think I will object to that, it is too remote, hasn't any bearing on it.

The Court: It might not be. Go ahead.

(Testimony of Frank L. Christensen.)

A. The transmission was locked, that is, the main transmission was locked in second gear. The other two gears were—I don't know whether the Brownlite—there was a three way Browning, I don't know whether it was in conventional or overdrive, because we could not move it in the Eaton or in overdrive.

Q. I will show you Plaintiffs' Exhibit 1, have you looked at that? A. Yes, sir.

Q. Now, what does that show with reference to the brakes?

A. It shows only the air brakes, the air brake level is down—the air brake level is right here, (indicating).

Q. And what does that mean; what does that signify? A. It means it was set.

Q. The air brake was set? [149]

A. Yes, sir.

Q. It was still set after the accident?

A. Yes, sir.

Q. And it was in that condition the following morning? A. Yes, sir.

Q. Would that truck, and I am speaking now from your own experience as a truck driver, owning your own trucks, if that truck, on its own motion, had moved, would it have been possible to come from that position where it was parked, down on the track?

A. I might answer you in this way, that I could not drive the truck through the direction that it went in daylight. I am not that good a driver.

(Testimony of Frank L. Christensen.)

Q. Well, what would have happened of its own motion?

A. Pulling into the track, the way it was explained to me, the way it was parked, and through—by my driver—the way the driver turned around and headed west, naturally, your truck, your wheels would have been turned to the right slightly, and if the truck would have rolled into the road or gone straight into the street across the service station—

Q. What would have happened?

A. You mean the way that the truck was parked according to my information?

Q. Yes. A. I don't know.

Q. What would have happened about jack-knifing?

A. Well, that is altogether possible that it could jack-knife, but I don't know that it was jack-knifed from where it was setting, from where I was told it was setting.

Mr. Struckmeyer: All right, cross-examine.

Cross-Examination

Mr. J. H. Morgan:

Q. What do you mean when you say you found the transmission locked in second gear?

A. I had instructions from the Santa Fe to move my truck off of the right of way, and I could not move it until we removed the rear axles. We couldn't even drag it, so we got in to see what was wrong, and I had a mechanic from the White Garage, I think it is the White Garage, it is below

(Testimony of Frank L. Christensen.)

the Beal Hotel, west from the Beal Hotel, come up and help me to see what was wrong, and he told me it was locked in second gear, and that is the first time I knew it. [151]

Q. By that you mean it was jacked up?

A. Jacked up, as it was sealed, it was locked in second gear.

Q. How long had this truck been operating?

A. The truck had been operating, I had owned it about six months, I think.

Q. What year was it?

A. It is—well, it is '41, but registered '40.

Q. Registered '40? A. Yes.

Q. Well, do you know approximately how many miles it ran? A. No, sir.

Q. A hundred thousand or better?

A. No sir, it could not.

Q. But it had operated, it ran rather consistently?

A. A truck will run an average of—my trucks run an average of 25,000 a year.

Q. Now, as I understand it, when you turned this truck over to Babbitt Brothers, they did the work on it? A. Yes, sir.

Q. You weren't there? A. Yes, sir.

Q. You didn't superintend the job? [152]

A. Yes, sir.

Q. You were right there when the work was being done? A. Yes, sir.

(Testimony of Frank L. Christensen.)

Q. Did you have some other particular duties to do?

A. Not that particular time, I only had two trucks.

Q. What was the purpose of turning it over to Dabbitt Brothers and going over there?

A. When I sold it I had my own mechanic that took care of my equipment, and at that particular time we was awful particular with mechanic—when we took a truck to the garage we was particular which mechanic worked on it.

Q. You didn't stay there all the time, did you?

A. Yes, sir; I did.

Q. You didn't work on the truck yourself?

A. No, sir.

Q. But you superintended that job. How long did it take?

A. I imagine it took about an hour and a half to check it.

Q. To check it? A. Yes, sir. [153]

Q. There was nothing done with the brakes?

A. Yes, sir.

Q. What was done with the brakes?

A. One rear wheel was pulled and a new gasket put in and the brake linings cleaned and washed.

Q. What else was done?

A. That is all, just checked the motor.

Q. Oh, I see, just a checking job?

A. That is right.

(Testimony of Frank L. Christensen.)

Q. I understood from your testimony you had an overhauling job?

A. No a new motor was put in a couple, three weeks before that.

Q. You saw the terrain around there where this accident occurred, you know the location of Peggy's Cafe; you know the location of the garages?

A. Approximately, yes, sir.

Q. Now, if I understand it, maybe I made a mistake, but it was your testimony from where your driver said this truck was parked, that you, yourself, could not possibly drive the truck down by the railroad track?

A. Not and get it in the position it was in, no, sir.

Q. Just couldn't be done?

A. I don't think so. [154]

Q. You could not have driven down there?

A. Not me. I could not have gotten over the tracks; I could not have gotten over the spur track that was in here. That was a raised track.

Q. That is, if you had to drive it from this point where your driver happened to leave it?

A. Yes, sir.

Q. All right. I think you are absolutely right. Now, Mr. Christensen, if this truck were parked up here at Peggy's Cafe?

A. Yes, sir.

Q. In the position indicated on this plat that I am pointing at here, could you, from that point, have driven the truck down onto the railroad track?

(Testimony of Frank L. Christensen.)

A. You mean described as this truck here?

Q. Yes. A. No, sir.

Q. Why not?

A. I could not have driven it—yes, if somebody had driven it, but that truck never would have moved more than 12 feet, because it would have jack-knifed the body against the cab.

Q. It could have been driven?

A. Oh, yes, it could have been driven.

Q. Even you could have driven it?

A. Oh, yes, even I could have driven it there.

Q. From that point? A. Yes, sir.

Q. Then, too, if it were parked in this manner and for some reason the brakes gave way, the brake leaked, or the car was parked in over-gear—there is such a thing as over-gear?

A. That is right.

Q. And only in high gear, and the brakes, for some reason, gave away, that could have rolled down hill?

A. I don't think so from this position, because there is a fence running here and it would have had to come down here and go across (indicating on diagram).

Q. There was no fence at that time.

A. Well, there is—it is not clear in my mind what the bulk plant is, but I think is the Shell Oil Company.

Q. I will show you a picture here—well, we will look at Defendant's Exhibit C for identification.

(Testimony of Frank L. Christensen.)

A. That map does not show the buildings along this spur here.

Q. All right. Will you mark this for identification, Plaintiff's Exhibit?

(The document was marked as Plaintiff's Exhibit [156] 9 for identification.)

Mr. Morgan: To refresh your recollection, Mr. Christensen, handing you Plaintiff's Exhibit 9 for identification, which I am advised is a photograph taken from the railroad track up toward these buildings shortly after the accident.

A. It was from about right here is the fence of the—I don't know if it is the bulk plant right here. This is Peggy's, and across the street from Peggy's is this Shell Service Station and this Associated Service Station is over on the left hand side.

Q. That is a fair representation of the situation as it existed there at that time, is it not?

A. Yes, I think so.

Q. Then between Peggy's Cafe and this railroad wreck that is shown on the photograph, there was no obstruction that would prevent this car from rolling down?

A. From its position up here?

Q. Yes.

A. Well, yes, there is poles in there and there is some piles of rubbish, the next morning when I got in there.

Q. Is it shown in this picture?

A. No, I don't—it is over in this way, Mr. [157] Morgan (indicating on exhibit).

(Testimony of Frank L. Christensen.)

Mr. Morgan: Well, we offer in evidence Plaintiffs' Exhibit 9.

(The document was received and marked as Plaintiffs' Exhibit 9 in evidence and handed to the jury.)

Mr. Morgan: Q. Well, summed up, as I understand from your testimony, that this car was actually parked as stated by Mr. Wilson down by this service station, and it would be impossible, as I understand from your testimony for the car to have rolled down on the railroad track at that point?

A. Of its own accord.

Q. The truck parked on the highway in front of the Associated Service Station, it would have been practically—it would have been impossible, as I understand your testimony, for that car to have rolled away down on the tracks?

A. I said I could not have put it down there.

Q. And you are an old driver, and could not have driven it from that position down on the tracks?

A. On the tracks it was on, no, sir.

Q. And if it had been parked up here at Peggy's Cafe, you, as a driver, could have driven it down?

A. I still could not have put it over on the one side where it went over, Mr. Morgan.

Q. Why?

A. Because it had saddle tanks on it and only six inch clearance.

Q. The truck was there?

(Testimony of Frank L. Christensen.)

A. I know it, it was there, but I said I could not have put it over there in daylight.

Q. The truck was there, it got there somehow.

A. That is right, it certainly was.

Q. And I believe you have admitted it was parked as indicated by Mr. Marbell on his plat there and the brakes for some reason had loosened and the car got away, and it could have rolled down the hill.

A. In the position in which Mr. Marbell set the truck?

Q. Well, approximately in that position.

A. No, sir, it could not have; it would jack-knife.

Q. What do you mean by "jack-knife"?

A. Because if it jack-knifed, it would have moved along this way and the semi would have pushed the trailer.

Q. That would depend, of course, on how the wheels of the truck were left? [159]

A. I might say all the information I had was where the truck was parked is what I heard Mr. Marbell say and my driver say. That, I don't know. I have confidence in my drivers.

Mr. Morgan: That is all.

Mr. Struckmeyer: That is all.

(The witness was excused.)

The Court: We will have our morning recess at this time. Keep in mind the Court's admonition.

(A short recess was thereupon taken.)

(After recess, all parties, as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Struckmeyer: Mr. Gore.

LEONARD J. GORE

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

Mr. Struckmeyer:

Q. State your name, please.

A. Leonard J. Gore.

Q. What is your business?

A. Truck driver and blade operator.

Q. How long have you been truck driver, how many years? A. About 14.

Q. In March, 1944, by whom were you employed? A. Frank L. Christensen.

Q. On that date what did you do; did you drive a truck? A. Yes, sir.

Q. What did you do?

A. Hauled sheep from Cameron to Kingman.

Q. And any other truck with you?

A. Yes, sir.

Q. Whose truck? A. Tex Wilson.

Q. You two drove together? A. Yes, sir.

(Testimony of Leonard J. Gore.)

Q. Followed each other? A. Yes, sir.

Q. You had unloaded your sheep immediately west of Kingman, or at Kingman?

A. West of Kingman.

Q. Yes, and then you two were together?

A. When we unloaded we were.

Q. Then what did you do?

A. We came back to Kingman, and I was having trouble with my truck, and Tex went on into Kingman with the understanding if I didn't come in in a [161] reasonable time, why, he would come back and get me.

Q. I see. All right. Now, did you get to Kingman? A. Yes, sir.

Q. And what time did you get there?

A. Some time after one. I don't know just exactly what time.

Q. Did you see Tex Wilson? A. Yes, sir.

Q. Where?

A. He was parked at the service station west of Peggy's Cafe.

Q. You have been in the courtroom, I believe?

A. Yes.

Q. You have gone over this map?

A. Yes, sir.

Q. When you got back to Kingman where was—where did you first see Wilson?

A. Setting by this service station with the hood up on the truck.

Q. What was the purpose of that?

(Testimony of Leonard J. Gore.)

A. Checking the oil.

Q. Now, on this map, Exhibit C, will you point out the place where he was parked? Step over here to the jury. [162]

(The witness complies and indicates on diagram).

Q. At the point marked X? A. Yes, sir.

Q. Indicated on the map? A. Yes, sir.

Q. All right, sit down. Then what did you do?

A. He came over to my truck when I parked. I pulled it up in front of the cafe. We nearly always had——

Q. Parking which way?

A. Parking, headed east.

Q. That is opposite the cafe?

A. Opposite the cafe.

Q. But on the other side?

A. On the other side of the highway, between the highway and some bulk plant, I don't know what the name of it was.

Q. And did you park your car there, or truck?

A. Yes, sir, and Tex came over to the truck and we went into the cafe and had a cup of coffee and a piece of pie.

Q. Now, in the meantime when he came over to your truck, where was his truck parked?

A. He left it at the service station.

Q. Right at the service station?

A. Right immediately in front of the gas pump.

Q. I see. Well, now, you have been in the court-

(Testimony of Leonard J. Gore.)

room and heard the manner in which he parked his truck? A. Yes, sir.

Q. How long have you been a truck driver?

A. 14 years or longer.

Q. You knew this particular truck?

A. Yes, sir.

Q. Was there anything that he could have done—you heard his testimony—anything that he could have done to safeguard his truck from running away?

A. Not unless he put something under the wheel, and it wouldn't be necessary on that kind of ground. It was very near level.

Q. Where he was parked? A. Yes.

Q. And you heard him say that he left the keys in the truck?

A. The keys was still in the truck when it was wrecked.

Q. Is that the customary way of doing?

A. We always left the keys in them.

Q. Always leave the keys in your truck?

A. Yes.

Q. When you parked your truck what did you do with your keys? [164]

A. Left it in the truck.

Q. And you went in the cafe?

A. Yes, sir.

Q. Then state what happened.

A. Well, we was—well, we were eating in the

(Testimony of Leonard J. Gore.)

cafe and there were four soldier boys came in and one of them said to the other, said——

Mr. Don Morgan: I object, your Honor, hear-say.

Mr. Struckmeyer: Yes, I guess so. You can't tell what they said. Did anything arrest your attention in the cafe?

A. Just the soldier boys, what they had said.

Q. What was the subject of their conversaaion?

A. The train had bitten something.

Q. Then what did you do?

A. Well, when we left the cafe, Tex said, "Somebody stole my truck."

Q. Well, did you go over to the truck, to the place where his truck was parked, in that direction? A. Yes.

Q. All right, and could you see right over to the service station?

A. No, there was a bus in between the service station and the cafe where we were at.

Q. A bus? [165] A. Yes.

Q. It stopped behind his truck, that is where his truck——

A. Behind where his truck had been.

Q. Had been, yes. All right, then—go ahead and tell what you did then.

A. Well, as soon as he missed his truck, why, I knew right off the reel what had happened because of what the soldier had said.

Q. That is the first thing that you knew?

(Testimony of Leonard J. Gore.)

A. Yes, and I went straight down to where the passenger train was parked, and right on straight to the end of it, and there was the truck.

Q. And you saw the truck then?

A. Yes, sir.

Q. Now, you saw how that truck was parked there, how it had been parked? A. Yes.

Q. And you know—were you well acquainted with Kingman at that time?

A. Well, we had been hauling to there for quite some time.

Q. That is what I mean, yes, with the terrain, generally you were acquainted? A. Yes.

Q. Was there any possibility of that truck, the way it was parked there for itself to have become loose and move away of its own accord?

A. I don't see how.

Q. It could not?

A. I don't believe that it would have moved if it had not even been in gear, or anything, because the ground was too level there at that gas pump.

Q. Did you look at the truck afterwards, the truck afterwards? A. Yes, sir.

Q. After the accident?

A. Yes, sir. Frank and I went down the next day and hauled it to Phoenix.

Q. When you say "Frank", you mean Mr. Christensen? A. Yes.

Q. In what condition was it at that time; was it in gear or otherwise?

(Testimony of Leonard J. Gore.)

A. It was in gear. We had to take the axles out before we could move it.

Mr. Struckmeyer: Cross examine.

Cross Examination

Mr. J. H. Morgan:

Q. You have been in the trucking business how long? [167]

A. I have been driving 14 years or longer.

Q. And you were with Mr. Christensen for some years prior to this March 24th?

A. I don't recall just exactly how long, but a year or longer.

Q. What was the number of this truck that was in this accident? A. 15.

Q. What was your number? A. 8.

Q. 8? A. Yes.

Q. Your truck, you say, was parked opposite Peggy's Cafe pointed to the east. Mr. Wilson shows the location of your truck at about this point, which would be east of Peggy's Cafe and the south part of the right of way?

A. Well, I was about here, parked about approximately with the end of the trailer parallel with the east part of the building. In other words, straight on the line.

Q. Across the road?

A. Yes, and there was some bulk plants.

Q. Over on to the south?

A. Yes, beyond the highway.

Q. That is right, that is right, between the [168] railroad track and where your truck was parked?

(Testimony of Leonard J. Gore.)

A. Yes.

Q. Now, when you came by and saw Mr. Wilson in his truck, did I understand you to say he was at that time out looking at the oil?

A. No, he was in his truck, but the hood was still up.

Q. Oh, I see, he was actually sitting in the truck when you came by? A. Yes.

Q. Now, it is your testimony, I take it, from where the particular point where you say this truck was parked that it would not run away even if there was no brakes on it?

A. I don't think it would. It might would.

Q. If the truck had been parked up on the crest of the hill in the region where Peggy's Cafe is located, it could easily have run away if the brakes gave way, could it not?

A. Well, it is not very steep in there, because this is on the driveway in here, leveled off, just enough grade in it toward the road for the water to come—

Q. If it got a start it could have easily rolled down hill?

A. Not sitting in this position, it could not.

Q. Why not?

A. Well, the trailer would be the only thing that would push it and it would jack-knife it, wouldn't it?

Q. I don't know, depending on how the front wheels were sitting. If the front wheels were set to the south rather than twisted around to the right,

(Testimony of Leonard J. Gore.)

that is, toward the curb, I think you can be justified in saying that the trailer would push it so it would start, wouldn't you?

A. Well, I don't think so.

Q. Well, you are an old truck man? Now, if that truck was parked on that grade—you have seen that grade, you know that the crest of the grade is right opposite Peggy's Cafe and there is a pretty steep grade to the south and west, everybody has so testified?

A. Yes, but the road is very near level. This here half of the road slopes this way, and this half slopes that way.

Q. But it does—the terrain slopes to the west?

A. Yes, the highway.

Q. All right. Now, if this car was parked as indicated on this plat—this truck was parked as indicated on this plat, without brakes and [170] without brakes, it would—

A. It wasn't parked there.

Q. Well, I am asking this hypothetical question. Assuming that the wheels were not turned to the north—that is to the right, but were set straight ahead or to the left, the front wheels, then that truck could have run way, couldn't it, and down this way (indicating on map)?

A. Well, I don't know. Not very many things that is impossible, but it is impossible for the truck to be sitting there.

Q. Now, if the truck was in what is known as overdrive and merely in high gear of overdrive,

(Testimony of Leonard J. Gore.)

that would not hardly hold the truck, would it, on a steep grade if the air brakes didn't hold and the mechanical brakes didn't hold?

A. If the grade was steep enough it would not stay there, if it was in high gear.

Q. Especially if there was overdrive?

A. Well, that doesn't change the ratio of gears very much.

Q. You have been running up and down that railroad for some time prior to this, have you not, you and Mr. Wilson?

A. Yes.

Q. You observed the traffic on the railroad?

A. No, I never.

Q. Well, you knew that in 1944 there were numerous trains running on that track, both east and west?

A. I knew at that time that there were lots of trains running all the time.

Q. Lots of trains, night trains?

A. Yes, sir.

Mr. Morgan: I believe that is all.

Redirect Examination

Mr. Struckmeyer:

Q. What do you mean by "jack-knifing"?

A. Well, the trailer—in other words, it is impossible for a trailer to roll on its own accord backwards because the trailer will not follow, and it will run around and get against the—anybody that has ever tried to back a trailer knows what I mean.

Q. Well, us lawyers maybe not, I don't know.

(Testimony of Leonard J. Gore.)

A. It would not have to be a semi-trailer, just any trailer. It is hard to back a trailer.

Q. How long did that truck stay there before you went into Peggy's; about how long?

A. Well, I don't know how long that Wilson had been there before I got there, but I know it [172] was there, oh, between eight, ten or twelve minutes, maybe fifteen.

Q. Well, it was under your observation?

A. Yes, sir; from the other side of the highway at my truck.

Mr. Struckmeyer: I think that is all.

Recross Examination

Mr. Morgan:

Q. What was wrong with your truck?

A. The radiator boiling.

Mr. Struckmeyer: Oh, just one question—pardon me.

Redirect Examination

Mr. Struckmeyer:

Q. Were you acquainted with this truck, this truck that Wilson was driving? A. Yes, sir.

Q. Had you driven it yourself?

A. Yes, sir.

Q. In what condition was that truck at that time; in what condition?

A. Fine condition, just as good as a new truck, brand new one.

Q. I mean the brakes and everything? [173]

A. Yes, sir.

Mr. Struckmeyer: All right, that is all.

Recross Examination

Mr. Morgan:

Q. Did you drive it that day? A. No, sir.

Q. You heard Mr. Christensen testify that some work was done on the truck, some kind of gasket in one of the brakes the day before. Do you know anything about that? A. No, sir, I didn't.

Q. When had you last driven that truck?

A. Well, before we started hauling sheep.

Q. Well, how long before March 24th, 1944?

A. I imagine two weeks.

Mr. Morgan: That is all.

Mr. Struckmeyer: You are not in the employ of Mr. Christensen now?

A. No, sir; I work for the Coconino Highway Department.

Q. And have not worked for him for some time past? A. No, sir.

(The witness was excused.) [174]

Mr. James Struckmeyer: Mr. Hubbard.

ELMER HUBBARD

was called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct Examination

Mr. James Struckmeyer:

Q. What is your name, sir?

A. Elmer Hubbard.

Q. Your occupation?

A. I run a refrigeration supply at Flagstaff.

(Testimony of Elmer Hubbard.)

Q. In Flagstaff? Yes, sir.

Q. Were you in Kingman on or about the 24th day of March, 1944? A. I was.

Q. Did you see a truck there belonging to Frank Christensen, a Lightning Delivery truck?

A. I saw the truck after the accident occurred, after it had been moved from the tracks.

Q. Yes. Did you inspect the truck, Mr. Hubbard, or look at it? A. Yes.

Q. Did you inspect the gearshift levers in the truck? [175] A. Yes, I did.

Q. In what condition were those gearshift levers?

A. I found the main gearshift, I imagine it was locked in gear, apparently locked in gear.

Q. Do you remember what gear?

A. No, I wouldn't know.

Q. Are you a trucker yourself? A. No.

Q. Do you know what an air brake is on a truck?

A. Well, I know the operate the brakes, but beyond that I haven't much information on it.

Q. Do you know where they are at?

A. No.

Q. Do you know any more about this accident at all, Mr. Hubbard, than you have testified?

A. That is all I know about it, excepting noise I heard.

Q. You heard a noise?

A. During the night, yes, it woke me up.

Q. You were in Kingman that night?

(Testimony of Elmer Hubbard.)

A. That is right.

Mr. Struckmeyer. I think that is all. [176]

Cross Examination

Mr. J. H. Morgan:

Q. Of course, you wouldn't know when it was put in gear?

A. No, I have no way of knowing?

Mr. Morgan: That is all.

(The witness was excused.)

Mr. James Struckmeyer: Mr. Fisher, please.

SIDNEY FISHER

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

Mr. Struckmeyer:

Q. What is your full name?

A. Sidney Fisher.

Q. Where do you live?

A. Flagstaff, Arizona.

Q. What is your occupation?

A. Civil engineer.

Q. Were you in Kingman March 24th, 1944?

A. Yes, I was.

Q. What was the occasion for being there?

A. Well, I was employed there at the time.

Q. Were you at or near the railroad depot in

[177] Kingman that night?

A. Yes, I was.

(Testimony of Sidney Fisher.)

Q. Will you tell the jury why?

A. Well, my wife phoned from Flagstaff that our son was coming through Kingman on a train—he was in the Air Corps, and that if I would go down to the station I might be able to see him for a few minutes, so I was down when—

Q. How long did you wait at the station?

A. Oh, probably a couple of hours. I stood around the station.

Q. You didn't know the schedule of this train?

A. No, I sure didn't.

Q. And did you see the first section of this train come in?

A. I don't believe it was the first section of this train. There was—I saw a train just ahead of this train that came in.

Q. Did you examine this train that came into the depot—did you examine that train looking for your boy?

A. Yes, I did. I walked the full length of the train looking in the windows to see if I could locate him and didn't see him, and walked back probably three or four car lengths towards the ticket office.

Q. And then was your attention directed to the second section of this train which was then outside of the yards?

A. Yes, it was. There was an Army officer that was trying to get on the train, and he and I had been talking there, and he walked up to the train with me and he said, "Well, there is another train

(Testimony of Sidney Fisher.)

right behind this one, and maybe he is on it," and he also hoped he could get on it.

Q. Then did you look to the east?

A. Yes, we stopped and he said, "We might as well stop here because it would save us walking back down again," and I stopped there and the first train pulled out, and it so happened my son was on it, in one of the rear cars, and I waved at him as he went by, and just waited there with the officer for the other train to—

Q. Tell the jury exactly what you saw about the section that was then coming in?

A. Well, we saw the other train coming and also saw something on the track. It amazed me, because there was no intersection there and the lights from the train, from the time it came around the bend, I think from the time the lights was lined up, that where we were standing we could see this object on the track. [179]

Q. Then what happened?

A. Well, the train just came on down and hit it.

Q. Did you hear the train apply the brakes?

A. No, sir, I didn't. It wasn't very far, but I am sure if it did, I didn't hear them. I am sure they applied them at the same time.

Q. You then walked to the—

A. Yes, I went on up to the—to where the accident happened.

Q. What did you see?

A. Well, I saw the truck there on the front end of the train; in fact, went up to the side of the

(Testimony of Sidney Fisher.)

train to see if anybody was injured, and one engine was leaning over on its—oh, the boiler, it wasn't on its side.

Q. Was the right door on the truck open when you walked up there?

A. Yes, the door on the truck was open; in fact, I thought there probably **would have been somebody** in it, you know. That is the first place I thought surely somebody was in that truck, and the door was open, but no one in it.

Q. Well, did you see anybody in or near the truck or leave it immediately before the accident?

A. I couldn't say there was anyone leaving. There was some people went away from the vicinity [180] of the accident down south.

Q. They were silhouetted against the light?

A. Against the light, yes. The officer made the remark, "Well, those people got out of the way."

Q. Pardon? A. Pardon me.

Q. Don't quote the officer. You say just before the accident?

A. Yes, before the train hit.

Mr. Struckmeyer: I think that is all.

Cross Examination

Mr. J. H. Morgan:

Q. You couldn't tell, of course, when you looked down that track, how far away the train was?

A. No, sir; I couldn't tell at night.

Q. There is a curve probably three-quarters of a mile east of Kingman?

A. Yes, there is a curve up there.

(Testimony of Sidney Fisher.)

Q. An outside curve, and then there is another curve between that main curve, a slight curve, you know that?

A. I am not too well acquainted with the line of track. I know there is quite a curve on east of Kingman. [181]

Q. While you were looking down that track, you say, and at the same time you saw this train, you saw this object on the track?

A. Well, when the lights lined up so it could show the object.

Q. Could you tell what it was?

A. No, sir; I couldn't tell then.

Q. How far away was it?

A. Oh, it was about six—five or six hundred feet, it just loomed up there.

Q. You saw nobody in the truck?

A. No, sir, I didn't see anybody in the truck.

Q. Saw nobody getting out of it?

A. Nobody getting out of it, no, sir.

Q. But after the accident, or about the time of the accident, you did see some—

A. It was just before it hit that—

Q. You saw some figures, you say?

A. Yes, sir.

Q. And they were over to the right of the track somewhere?

A. Yes, on the south side of the track.

Q. The other side of which track, the main track or the westbound?

A. Well, the tracks there.

(Testimony of Sidney Fisher.)

Q. They were clear south of all the tracks? [182]

A. They were in the light of the locomotive and about the same time I saw the object, I think they were getting out of the way of the train.

Q. You don't know whether they were railroad men who had been working around the—

A. No, I could not. There was a lot of people at that time.

Q. You don't know whether they were men or women?

A. No, sir.

Mr. Morgan: I believe that is all.

Redirect Examination

Mr. Struckmeyer:

Q. You couldn't see Peggy's Cafe from the depot, could you?

A. I don't believe you could. I don't know. Honestly, I never looked at Peggy's Cafe.

Q. You didn't see a truck coming down grade, did you?

A. No, no, I didn't see it.

Q. You didn't see it until it was on the track?

A. Until it was on the track, and the lights.

Mr. Struckmeyer: All right, that is all.

(the witness was excused.)

Mr. Struckmeyer: We wish to read into the [183] record the deposition of Charles Lee Trotter, from the deposition on file, if your Honor please, in this court, the deposition taken on the 3d day of April, 1945.

Mr. Morgan: Whose deposition?

Mr. Struckmeyer: Charles Lee Trotter. The

question: "When did you go back to work? Answer: The 9th of February. Question: Of this year? Answer: Yes, '45. Question: As watch? Answer: As a locomotive fireman. Question: Practically the same duties that you did before? Answer: Yes, only in passenger service. Question: Oh, I see, your pay is increased, then, more than you received on February 24th of last year? Answer: Well, about the same." Do you desire to read any other part?

Mr. Morgan: No.

Mr. Struckmeyer: On Page 10 of the deposition of Rayburn, taken on the 3d day of April, 1945.

Mr. Morgan: That was all read before?

Mr. Struckmeyer: No.

Mr. Morgan: It doesn't matter.

Mr. Struckmeyer: I read a part of it.

"Question: Yes. You have been back to work?

Answer: February the 1st of this year. Question:

The same duties? Answer: Yes, sir. Question: [184]

And are able to perform those duties? Answer: I

have been restricted to Diesel power only, on ac-

count of my injuries. Question: Receive the same

pay as you did prior to the accident, though? An-

swer: Yes, sir. Question: And doing the same work

practically, except that you are restricted to Diesel

power? Answer: Yes, sir."

Mr. Struckmeyer: That is all. If your Honor pleases, we again move the introduction of these two certified copies of the complaint in California, for the same reasons stated yesterday.

The Court: The motion is denied.

Mr. Struckmeyer: We rest.

PLAINTIFFS' REBUTTAL TESTIMONY

JOHN S. RAYBURN

was recalled as a witness in rebuttal for the plaintiffs, and being theretofore duly sworn, testified as follows:

Direct Examination

Mr. Don Morgan:

Q. You have heard a portion of your deposition just read to you—read to the Court by Mr. Struckmeyer? A. Yes, sir. [185]

Q. Now, when you say in that deposition in answer to this question: "I have been restricted to Diesel power only on account of my injuries," and this question: "Receive the same pay as you did prior to the accident, though? Answer: Yes, sir." Just exactly what did you mean by that, by that answer?

Mr. Struckmeyer: Your Honor please, to that we object as not being proper rebuttal. The language speaks for itself.

The Court: He was merely asking whether he made the statement, that was the only issue, whether he had or whether he had not.

Mr. Struckmeyer: Yes, that should be limited.

Mr. Don Morgan: Your Honor, I believe he is entitled to explain any answer that is given.

The Court: The question is whether he made the answer, not what he meant.

Mr. Don Morgan: Very well, I believe it has been explained. That is all.

(The witness was excused.)

Mr. J. H. Morgan: Mr. Marbell. [186]

SAM MARBELL

resumed the witness stand and testified on behalf of the plaintiffs on rebuttal as follows:

Direct Examination

Mr. J. H. Morgan:

Q. Did you have a conversation with Mr. Wilson, the driver of the truck involved in this accident the morning of the accident? A. I did.

Q. Where did that occur?

A. At the scene, or near the scene of the accident.

Q. Who was present besides Mr. Wilson and yourself?

A. I believe Mr. Willis, the patrolman at that time, Willis.

Q. What, if any, explanation did he make, statement did he make pertaining to the truck running away?

Mr. Struckmeyer, Sr.: Your Honor please, I object to the form of the question, what explanation; generalities.

Mr. Morgan: Q. Did he at that time state to you in the presence of Mr. Willis that the truck ran away because the air brakes leaked, or words to that effect? A. He did.

Mr. Struckmeyer, Sr.: That is objected to, if the Court please, on the ground just mentioned. He might ask what did he say.

The Court: All right, what did he say at that conversation?

(Testimony of Sam Marbell.)

A. The driver stated that the only reason he could find for it getting away was the fact that he lost his air.

Mr. Morgan: Q. During your talks with Mr. Wilson while you were investigating the event that morning, did he state at any time that he was parked in front of this service station?

A. He did not.

Q. What, if any, statement did he make to you as to where he was parked?

A. The general idea, including his own, was that he was parked up in the vicinity of the cafe.

Q. That is Peggy's Cafe?

A. That is right.

Q. Was there any suggestions made by Mr. Wilson or anyone else at the time you were making this investigation, that somebody might have gotten in the truck and driven it away? A. No, sir.

Q. At the time you examined the truck are you able to say whether or not the ignition keys were in the truck?

A. I can't say; I didn't notice.

Mr. Morgan: I believe that is all. Take the witness.

Cross-Examination

Mr. Struckmeyer, Sr.:

Q. Have you been able to obtain your notes since yesterday? A. Beg pardon?

Q. Have you made an effort to obtain your notes since yesterday? A. I have not.

Q. The notes you took at the time?

(Testimony of Sam Marbell.)

A. I took notes at the time.

Q. Where are they?

A. They have been destroyed possibly two years ago.

Q. By whom? A. By me.

Q. They were turned into the Highway Department, were they not?

A. They were not. If the Court please, I'd like to explain why. [189]

The Court: I think you said the other officer made the report yesterday.

Mr. Struckmeyer: Yesterday he stated that, yes. As a matter of fact, Mr. Marbell, you tried to get the driver to admit that he left his car without brakes? A. I did not.

Q. You stated yesterday that if the car was parked here, up here in front of that service station, it could not have gotten away, rolled away.

A. To that point, yes.

Q. And you still say that?

A. That is right.

Q. Unless there was outside interference from that point, from that point, yes.

A. To where the accident occurred, it would be practically impossible for the truck to run unattended.

Q. Unattended? A. Yes.

Q. It would have jack-knifed?

A. I don't know.

Q. If it moved at all?

A. I never have pictured the truck parked in

(Testimony of Sam Marbell.)

that position, I haven't considered what it might do. [190]

Q. I see, but it could not, from that position, if it was parked there, it could not, of its own power or on its own motion have run away?

A. That is correct.

Mr. Struckmeyer: That is correct. That is all.

Redirect Examination

Mr. Morgan:

Q. You wish to make an explanation about the destruction of those notes of yours? Go ahead and make it.

A. The general procedure, when there is more than one officer investigating an accident is, that one submits the reports to the Highway Department to avoid repetition, which it would be. However, both, and all of the officers on duty and on the investigation compare notes and compiled the report, and one officer made the report out, but the only notes I had left, I had only the notes that I made, and had, were my work sheets that were made at the scene of the accident, and after taking the information off of those and passing them on for the report, I had no more use for the notes.

Mr. Morgan: That is all.

Mr. Struckmeyer: That is all.

(The witness was excused.) [191]

Mr. Morgan: The plaintiffs rest.

The Court: Do you have anything further?

Mr. Struckmeyer: No, your Honor.

The Court: We will suspend until ten o'clock

Friday morning. Keep in mind the court's admonition.

(Thereupon a recess was taken at 11:50 o'clock a.m. of the same day.)

10 o'clock a.m., all parties as heretofore noted by the clerk's record being present, the trial resumed, as follows:

Mr. Struckmeyer, Sr.: If the court please, we renew our motion for an instructed verdict.

The Court: The motion is denied. You may proceed with your argument, gentlemen.

(Whereupon, counsel for both sides presented their closing arguments to the jury, after which a recess was taken until 2 o'clock p.m.)

2 o'clock p.m. of the same day, all parties noted by the clerk's record being present, the trial resumed, as follows: [192]

THE COURT'S CHARGE TO THE JURY:

The Court: It now becomes the Court's duty, gentlemen, to instruct you as to the law that applies to this particular case.

The issues, briefly, in the two cases on trial here are as follows:

The plaintiffs Rayburn and Trotter were engineer and fireman respectively on a locomotive owned by the Atchison, Topeka & Santa Fe Railway Company. Plaintiffs claim that while they were operating said locomotive in the railroad yards at Kingman, Arizona, it collided with a truck owned by the

defendant Frank L. Christensen; that said truck had been negligently and carelessly parked by defendants above the tracks of the Railroad Company, and was suddenly caused to run driverless away into the railroad tracks. That the locomotive was derailed and plaintiffs were injured and suffered damages as set out in their pleadings. The defendant denies generally the claims of the plaintiffs.

Now, negligence is the omission to do something which a reasonably prudent person would have done under the circumstances, or the doing of something which such a person would not have done under the [193] same conditions. It is not absolute or intrinsic, but is always relative to some circumstances of time, place or person.

By "ordinary care" is meant that degree of care which an ordinarily careful and prudent person would have exercised under the same or similar circumstances; and the failure upon the part of any person or corporation to exercise that degree of care is negligence.

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injuries. It may operate directly or through intermediate agencies or through conditions created by such agencies.

This does not mean that the law seeks and recog-

nizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in [194] law as a proximate cause.

I instruct you that the laws of Arizona, Section 66-118, A.P.A. 1939, provide:

“No person having control or charge of a motor vehicle shall allow it to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor, and when standing upon any grade without turning the front wheels to the curb or side of the driveway.”

If you should find from the evidence in this case that C. E. Wilson, the driver of the truck involved in this accident, failed to comply with the provisions of the section just read to you and that he left said truck unattended, without first effectively setting the brakes thereon, or without turning the front wheels to the curb or side of the roadway, you are instructed that such failure constitutes negligence as a matter of law.

However, in this action, a violation of this law would not be of any consequence unless it was the proximate cause or contributed in some degree as a proximate cause to the injuries found by you to have been suffered by the plaintiffs, or either of them, in the event you so find they have suffered injuries.

It is the universal rule that when an agent [195] is acting in the due course of his duties, that any act performed by the agent within the scope of his duty is binding upon his employer. So, in this case, if you find that the agent, the driver, C. E. Wilson, was guilty of negligence and carelessness, as alleged in the complaint, then such carelessness or negligence will be attributable to his employer, the defendant, and the defendant would be liable for the neglect of said agent.

From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiffs. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he did, in fact, exercise ordinary care and diligence, or that the accident occurred without being proximately caused by any failure of duty on his part.

The instruction just given may appear to constitute an exception to the general rule, that [196] the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows:

First: The fact that some certain instrumentality, by which injury to the plaintiffs was proximately caused, was in the possession and under the exclusive control of the defendant at the time the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act or omission incident to defendant's management.

Second: The fact that the accident was one of such nature as does not happen in the ordinary course of things, if those who have control of the instrumentality use ordinary care.

Third: The fact that the circumstances surrounding the causing of the accident were such that the plaintiffs were not in a position to know what specific conduct was the cause, whereas, the one in charge of the instrumentality may reasonably be expected to know and be able to explain the precise cause of the accident.

When all these conditions are found to have existed, the inference of negligence to which they [197] give birth will support a verdict for the plaintiffs in the absence of a showing by the defendant that offsets the inference.

In civil cases, a preponderance of the evidence is required, and by a "preponderance of the evidence" is meant such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests.

While it is incumbent on the plaintiffs to prove their case by a preponderance of the evidence, the

law does not require of the plaintiffs' proof amounting to demonstration or beyond a reasonable doubt. All that is required in order for plaintiffs to sustain the burden of proof is to produce such evidence which, when compared with that opposed to it, carries the most weight, so that the greater probability is in favor of the party upon whom the burden rests.

If any allegations of the complaints herein are admitted as true by the answer of the defendant, then in your deliberation you must proceed upon the theory that such allegations of such complaints, for all purposes in the case, as true.

If you find that the plaintiffs are entitled [198] to recover, you may award them such damages, within the amount claimed, as within your opinion will compensate them for the pecuniary damages proved to have been sustained by them, and approximately caused them by the wrong complained of. And, in estimating the amount of such damages, you may consider the physical and mental pain suffered, if any, the nature, extent and severity of their injury or injuries, if any, the extent, degree and character of suffering, mental or physical, if any, its duration and its severity, and the loss of time and value thereof, and the loss of earning capacity.

You may also consider whether the injury was temporary in its nature, or is permanent in its character, and from all these elements, you will resolve what sum will fairly compensate the plaintiffs for the injuries sustained.

If you find that the plaintiffs are entitled to re-

cover, the measure of their recovery is what is denominated compensatory damages; that is, such sum as will compensate them for the injuries they have sustained.

If from the evidence in the case, and under the instructions, you find the issues for the plaintiffs, then in order to enable you to estimate [199] the amount of such damages as you may allow for pain and suffering, it is not necessary that any of the witnesses should have expressed an opinion as to the amount of such damages, if any; you may estimate such damages from the facts and circumstances and evidence, and by considering them in connection with your own knowledge and experience in the affairs of life. With regard to pain and suffering, the law prescribes no definite measure of damages, but leaves such damages to be fixed by you as your discretion dictates and as under all the circumstances may be just, reasonable and proper, not exceeding the amount prayed for in the complaint.

If you believe from the evidence that the driver of the truck in question exercised ordinary and reasonable care in parking the truck, and that he took such steps as an ordinary and reasonably prudent person would take to safeguard the said truck against moving, then in that event you shall return a verdict for the defendants.

I further charge you that if the defendants, acting through the driver of his truck, exercised reasonable and ordinary care as I heretofore defined to you, in the parking of the truck, and though said

truck thereafter, through external [200] cause not shown by the evidence, came to rest on the tracks of the Santa Fe Railway Company, then it is your duty to find a verdict for the defendant. In other words, it is not the duty of the defendants to explain or show the reason why their truck came upon the tracks of the Santa Fe Railway Company, but it is the duty of the plaintiffs to prove by a preponderance of the evidence that this truck came upon the track of the Santa Fe Railway Company through the negligence of the defendant.

In judging of the evidence in this case, gentlemen, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply strange construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his [201] character for truth, honesty and integrity, or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the manner in which he might be affected by the verdicts, and the extent to which he is contracted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

There is nothing peculiarly different in the way a jury is to consider the proof in a civil case from that by which men give their attention to any question depending upon evidence presented [202] to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment.

Jurors are expected to agree upon a verdict where they can conscientiously do so. You are expected to consult with one another in the jury room, and any juror should not hesitate to abandon his own view when convinced that it is erroneous. In determining what your verdict shall be, you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which

was ordered stricken out, must be wholly left out of account and disregarded. The opinion of the Judge on any issue in the case, if directly or inferentially expressed in these instructions, or at any time during the trial, is not binding upon the jury, for to the jury exclusively belongs the duty of determining the facts. The law you must accept from the Court as correctly declared in these instructions.

After you retire to your juryroom you will select one of your number to act as foreman and [203] proceed with your deliberations. Forms of verdict have been prepared for your guidance. They are both the same; that is, there is one for each plaintiff, there being two actions. I will read first: "John S. Rayburn, plaintiff, against Frank L. Christensen, doing business as Lightning Delivery Company.

"We, the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the plaintiff, John S. Rayburn, and assess his damages at blank dollars."

You will use that form of verdict in the event you find for the plaintiff, John S. Rayburn.

The other, in the same case, omitting the title of the Court and cause—"We, the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the plaintiff, Charles Lee Trotter, and assess his damages at blank dollars."

As I said, after you have agreed upon a verdict or verdicts, in the event you do agree, you will have the forms of verdict agreed upon signed by your foreman and return it to open court. Any verdict

agreed upon, of course, must be the unanimous verdict of the jury.

You may retire now in the custody of the [204] bailiffs.

(Thereupon the jury retired from the courtroom at 3:45 o'clock, p.m., of the same day to deliberate on their verdicts.)

The Court: Any exceptions to the instructions?

Mr. James Struckmeyer: The defendant excepts to the giving of plaintiffs' substituted instruction No. 8, on the grounds and for the reasons that the said instruction is not applicable to the fact situation herein; said instruction contains an incorrect statement of the law, and that the said instruction puts before the jury factors which are not present in this case.

Mr. Struckmeyer, Sr.: May we note an exception to plaintiffs' Instruction No. 6, for the reason that there is no evidence to support the giving of such instruction.

Mr. James Struckmeyer: The defendants object to the Court's refusal to give defendants' Instruction No. 2 on the ground that it is reasonably the fact situation in this case, and the same is a correct statement of the law, and the Court's refusal to give the instruction is prejudicial under the circumstances.

The defendant objects to Plaintiff's 5 and 6, on the ground that the evidence shows [205] that the truck in question was not parked upon a public highway, and that the laws of the State of Arizona are only applicable to the public highways. [206]

I hereby certify that the proceedings had upon the aforementioned trial are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 206 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,
Official Reporter.

United States of America,
District of Arizona—ss:

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing and attached is the original of the reporter's transcript filed May 24, 1948, in cases Nos. Civ.-111 Prescott, John H. Rayburn vs. Frank L. Christensen, doing business as Lightning Delivery Co., and Civ.-112 Prescott, Charles Lee Trotter vs. Frank L. Christensen, doing business as Lightning Delivery Co., and the same is hereby certified as a part of the record on appeal in said cases.

Witness my hand and the seal of said court this 22nd day of June, 1948.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: Filed May 24, 1948.

[Endorsed]: No. 11964. United States Circuit Court of Appeals for the Ninth Circuit. Frank L. Christensen, Appellant, vs. Charles Lee Trotter and John S. Rayburn, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed July 2, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 11964

FRANK L. CHRISTENSEN,

Appellant,

vs.

JOHN S. RAYBURN,

Appellee.

and

FRANK L. CHRISTENSEN,

Appellant,

vs.

CHARLES LEE TROTTER,

Appellee.

STATEMENT OF POINTS TO BE RELIED ON

The appellant will rely on the following matters:

1. That defendant's Exhibit "A", marked for identification, should have been admitted in evidence as a contradictory statement or an admission against interest.

2. That the trial court committed error in its instructions to the jury in that the said instructions prejudicially assumed facts not in evidence.

3. That the doctrine of *res ipsa loquitur* could not be applied under the evidence.

4. That the evidence not only failed to show negligence upon the part of the appellees, but affirma-

tively showed that the act of an independent agency operating without negligence upon the part of the appellant was the sole and proximate cause of the accident complained of.

STRUCKMEYER &
STRUCKMEYER,

By /s/ F. C. STRUCKMEYER,
Attorneys for Appellant.

[Endorsed] : Filed July 12, 1948. Paul P. O'Brien,
Clerk.



No. 11964

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

FRANK L. CHRISTENSEN,

Appellant,

vs.

CHARLES LEE TROTTER and
JOHN S. RAYBURN,

Appellees.

Brief of Appellant

FRED C. STRUCKMEYER
207 Luhrs Building
Phoenix, Arizona.
Attorney for Appellant.

SEP 21 1948

PAUL P. O'BRIEN,

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

FRANK L. CHRISTENSEN,

Appellant,

vs.

CHARLES LEE TROTTER and
JOHN S. RAYBURN,

Appellees.

No.
11964

II

STATEMENT OF JURISDICTIONAL FACTS

The two cases here consolidated on appeal arose by original suit in the District Court of the United States in and for the District of Arizona. The plaintiffs alleged that defendants were all residents and citizens of the State of Arizona (T/R Page 2) and that the plaintiff(s) was a resident and citizen of the State of California (T/R page 3). There was a further allegation that the amount in controversy exclusive of costs and interest was in excess of Three Thousand Dollars (T/R page 3).

In both cases jurisdiction is given the District Court by Title 28, Section 41, the suits being of a civil nature, the matter in controversy exceeding (exclusive of interests and costs) the sum of Three Thousand Dollars, and being between citizens of different states.

Jurisdiction of the Circuit Court of Appeals for the Ninth Circuit depends upon Judicial Code, Section 128 Amended, Title 28-Section 225, providing that the circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions of the District Courts.

III

STATEMENT OF THE CASE

The causes of action arose out of an accident which occurred in Kingman, Arizona, the 24th day of March, 1944. The plaintiffs were engineer and fireman respectively on a west bound Atchison, Topeka & Santa Fe Railway train. It is undisputed that a truck belonging to the appellant had come to a stop across the Atchison Topeka & Santa Fe Railroad tracks. The truck was driverless so far as could be ascertained. The train collided with the truck and plaintiffs contend that they were injured as a result of the collision. Each plaintiff secured a verdict at the hands of a jury.

The ultimate question involved on this appeal is the responsibility of the appellant for the unexplained "running away" of appellant's equipment. Involved in the ultimate question is the application of the *res ipsa loquitur* doctrine, which application was disputed by appellant on motion for directed verdict at the close of the plaintiffs' case and raised again on instructions given by the presiding Judge, and raised yet again by motion for judgment notwithstanding the verdict and motion for new trial.

During the trial appellant offered in evidence the record of suits instituted by the plaintiffs, appellees

herein, against the Atchison Topeka & Santa Fe Railroad Company for personal injuries received in the accident, allegedly due to the negligence of the Railroad Company. The records were offered as statements against interest and for impeachment purposes. The Court denied the admission of the records as evidence.

The Court instructed the jury at the request of the plaintiffs that the statutory provisions of the State of Arizona relating to the parking of automotive equipment on a highway and setting a standard of care were applicable to the fact situation. Appellant objected to the instruction on the ground that the undisputed evidence was that the trucking equipment was not parked upon a public highway of the State of Arizona and that the instruction misled the jury as to the care required.

It is for determination of these questions that appellant has perfected his appeal.

IV

SPECIFICATION OF ERRORS

1. The Court erred in rejecting evidence offered by the defendant, being defendant's Exhibit "A" and "D" for identification, which was offered to prove that the plaintiff in this (these) action had made inconsistent statements as to the cause of the accident and further offered for use in impeachment as to the proximate cause of the accident. (Trotter T/R 99-101 and Rayburn T/R 117). The evidence rejected (Defendant's A and D for Identification) consisted of complaints verified by the plaintiffs' attorney that the accident in question was solely caused by the negligence of the Atchison Topeka and Santa Fe Railroad Company, and should have been admitted in evidence to

impeach the testimony of the plaintiffs by inconsistent statements.

2. The Court erred in denying the defendant's motion for a directed verdict at the close of the plaintiffs' evidence (T/R page 121) for the reason that the evidence at the close of the plaintiffs' cases had failed to establish proof of any negligence of the defendant.

3. The Court erred in failing to direct a verdict in favor of the defendant at the close of the case (T/R page 187) for the reason that the uncontradicted testimony showed that there was no negligence on the part of the defendant.

4. The Court erred in denying defendant's motion for an instructed verdict at the close of all of the evidence (T/R page 187) for the reason that the uncontradicted testimony of the witness for plaintiff and defendant showed no negligence on the part of the defendant which was or could have been the cause of the movement of the unattended equipment.

5. The Court erred in instructing the jury as follows: "I instruct you that the laws of Arizona, Section 66-118 A. C. A. 1939, provide: 'No person having control or charge of a motor vehicle shall allow it to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor, and when standing upon any grade without turning the front wheels to the curb or side of the driveway.'

"If you should find from the evidence in this case that C. E. Wilson, the driver of the truck involved in this accident failed to comply with the provisions of the section just read to you and that he left said truck attended, without first effectively setting the brakes thereon, or without turning the front wheels

to the curb or side of the roadway, you are instructed that such failure constitutes negligence as a matter of law'." (T/R page 189);

for the reason that the statutes of the State of Arizona quoted in the instructions are not applicable to the fact situation, and imposed a burden upon the defendant by law which was in excess of the burden imposed of ordinary care, and for the further reason that the instruction assumed facts which were not in evidence, and assumed facts directly contrary to the evidence.

6. The court erred in instructing the jury as follows:

"From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiffs. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he did, in fact, exercise ordinary care and diligence, or that the accident occurred without being proximately caused by any failure of duty on his part.

"The instruction just given may appear to constitute an exception to the general rule, that the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows:

"First: The fact that some certain instrumentality, by which injury to the plaintiffs was proximately caused, was in the possession and under the exclusive control of the defendant at the time

the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act or omission incident to defendant's management.

"Second: The fact that the accident was one of such nature as does not happen in the ordinary course of things, if those who have control of the instrumentality may reasonably be expected to know and be able to explain the precise cause of the accident.

"When all these conditions are found to have existed, the inference of negligence to which they give birth will support a verdict for the plaintiffs in the absence of a showing by the defendant that offsets the inference." (T/R page 190-191);

on the ground and for the reason that the instruction constituted comment on the weight of the evidence and for the further reason that the court incorrectly and prejudicially applied the rule of "*res ipsa loquitur*."

V

SUMMARY OF ARGUMENT

The argument herein is divided into three main heads: that is, first, the trial court's ruling on the evidence, second, the application of *res ipsa loquitur*, and third, the instructions given.

VI

ARGUMENT

Defendant's Exhibits "A" and "D" for Identification

The defendant's Exhibit "A" and "D" for identification are copies of complaints filed by the plaintiffs in their actions against the Santa Fe Railroad Com-

pany for injuries suffered in the accident involved in this case.

The complaints were drawn by an attorney for the plaintiffs and verified by the attorney. (Trotter, T/R 98-99-100 and Rayburn T/R 116-117). The complaints charged the Santa Fe Railroad Company with the specific acts of negligence and alleged that as a result of the negligence the collision occurred and the injuries were suffered.

In *Quealy Land and Livestock Co. v. George*, 18 Pac. (2d) 253, (Wyo. 1933), the Wyoming Court said:

“The pleading of a party in another action if it contains facts inconsistent with his position in the action on trial is competent evidence against him, and its admissibility is not affected by the fact that the pleading was signed and verified by his attorney; and that is especially true where from the very nature of the facts they must have been furnished the attorney by the party. 22 C. J. 335, Sec. 376. Quoting from *Johnson v. Russell*, 144 Mass. 409, 11 N. E. 670, 671, ‘Defendant’s answer in the Campbell suit was competent evidence against him in this suit; and it makes no difference whether he had seen the answer or knew its contents.’

“In *Clarke v. Taylor*, 269 Mass. 335, 168 N.E. 806, 807, the Court says: ‘The pleading of formal allegations by an attorney may be presumed to have been made without special instructions from his client, but in statements setting out a specific cause of action or defense the attorney is presumably acting under special authorization of his client.’”

Quealy Land & Livestock Co. v. George, Supra pages 255, 256.

In *Johnson v. Russell*, 144 Mass. 409, 11 N.E. 670, the Massachusetts Court declares the rule:

“When it is a pleading by an attorney of formal allegations, which may be presumed to have been made without special instructions from his client, it is not competent. But particular and specific allegations of matters of action or defense which cannot be presumed to have been made under the general authority of the attorney, but are obviously from specific instructions of the party, are competent.”

Johnson v. Russell, Supra.

It is true that Mr. Trotter denies that he ever saw a copy of the pleading that had been filed (T/R 101), but it is also true that the plaintiff “gave them all he had” (T/R 101) about the accident.

The positions assumed by the plaintiffs in the two cases are incompatible and completely inconsistent. The allegation in the present case is that a truck owned by the defendant “was so carelessly and negligently parked by defendants on the roadway * * * that it was suddenly caused to run away driverless and to run * * * on to the said railroad tracks and to collide with the said locomotive engine.” (T/R 4).

The plaintiffs, having adopted one theory of the case against one defendant, may be impeached by a later declaration against another defendant which in the case of the later defendant specifically urges separate grounds for action and by direct reference removes the onus of the accident from the defendant on trial.

It is ordinarily true that in the case of a “run away” automobile there may be a presumption that the defendant was negligent. Without now touching on the

“res ipsa loquitur” doctrine, we believe the analysis of the Arizona Supreme Court determinative as to this point. In *Phen v. All American Bus Lines*, 110 Pac. 2d 227 (Ariz. 1941) a passenger on a bus sustained injuries as a result of an accident. When the accident occurred the plaintiff was asleep and knew nothing of its cause. The witnesses who were awake at the time testified that the collision was not the fault of the driver of the bus. The Supreme Court of Arizona says:

“If, however, there are two concurring causes of the accident, one of which is under the control of a stranger, and there is no evidence it was any more likely that the injury was caused by the negligence of the defendant than by that of the stranger, the rules does not apply. Further, if the uncontradicted testimony of disinterested witnesses shows clearly that there was no negligence on the part of the defendant and that the accident was caused solely by the negligence of a third party, the case is one for the court and not for the jury.”; and further says:

“We have held repeatedly that a jury may not, as a matter of law, disregard the uncontradicted testimony of disinterested witnesses in regard to a fact. *Illinois Bankers’ Life Ass’n v. Theodore*, 44 Ariz. 160, 34 P 2d 424; *Crozier v. Noriega*, 27 Ariz. 409, 233 P. 1104; *Otero v. Soto*, 34 Ariz. 87, 267 P. 947. The five passengers on the bus and the eyewitness nearby all testified positively and unequivocally that the bus was proceeding with proper circumspection and observing the rules of the road, and that the accident was caused by the negligence of the driver of the other automobile. Their testimony was in no manner discredited nor contradicted. This, as a matter of law, overcame any inference or presumption which was permissible under the rule of res ipsa loquitur.”

The defendant should have been permitted to show that the plaintiffs, in another action, had ascribed the injuries received by them to another cause. To hold otherwise is to permit multiple recovery for a single injury. The proffered evidence was competent for impeachment purposes.

Res Ipsa Loquitur

Referring again to the last cited case, *Phen v. All American Bus Lines*, Supra, its application to the instant case is apparent.

The direct evidence in the instant case negatives a theory of negligence on the part of the operator of the trucking equipment. The only evidence to support the claim of negligent parking is a possible presumption. If the presumption ever validly applied, it was overcome by direct evidence and the case should have been taken from the jury for failure to prove the negligence alleged.

Q. "Now, after you parked your truck what did you do with your truck?"

A. "First turned off the key, check to see if it was in gear, had three gearshifts, had three gearshifts on it, I pulled on the air brake lever, had to use that to stop with, and then I checked to see if it was in gear and then pulled on my emergency brake and I sat and waited for the other truck."

Q. "Was that all that you could do; did you do everything that you could do with the truck?"

A. That is right.

Q. "And that was the regular way of parking it?"

A. "That was the way I always parked my truck."

Q. "Well, you have seen other truck drivers, you know that business, don't you?"

A. "Sir?"

Q. "I say you know that business, the trucking business?"

A. "Yes, sir; I should."

Q. "Now, could that car have moved away from there of its own motion, your truck?"

A. "No, sir."

Q. "Could not?"

A. "Could not move without a push. It either have to be out of gear or the brakes off."

Q. "You did everything that could be done, did you not, to make sure that it stayed there?"

A. "I did, all but getting out and hunting a rock to block the wheel."

T/R 138, 139.

When definite and positive testimony is placed on the scale any presumptions disappear and the burden then shifts to the plaintiff to produce affirmative evidence of negligence.

Seiler v. Whiting

52 Ariz. 542, 84 Pac. 2d 452.

It may be noted that the only positive testimony as to the location of the truck was given by the only eye-witnesses, the truck drivers, who were not interested parties. Both testified that the truck was parked in the oil station or garage. (T/R 138 and T/R 163). The witness for the plaintiff, Sam Marbell, a highway patrolman who investigated the accident, assumed that the truck was parked near Peggy's Cafe, (marked "B")

on the blackboard diagram which is incorporated in the record on page 28 thereof.) (T/R 66-67). Marbell says:

“I didn’t see the truck parked there, but my investigation told me that the truck was parked there.” (T/R 73)

Marbell also says:

Q. “The only reason you say the car was not parked over here in the garage area is because it could not have gotten away on its own power?”

A. “No, sir.”

Q. “Unless somebody interfered with it, somebody set it in motion?”

A. “That is right.”

T/R 79.

Marbell offers the alternative which completely dispells the application of the *res ipsa loquitur* doctrine when Marbell says:

A. “With mechanical failure it could have done anything. I don’t know whether the brakes were set or not.”

Q. “But there would have to be mechanical failure before it could of its own motion?”

A. “Either that or negligence on the part of the driver in not setting the controls.”

T/R page 79

Q. “But if it had been parked in this garage area it could not have gotten away at all unless somebody had caused it?”

A. “That is right.”

T/R pages 79-80

The instruction based on Marbell’s presumptions, call for presumption built on presumption, and com-

pletely disregard defendant's theory of the case that some independent intervening agency put in motion a force without negligence on the part of the defendant, and must have irresistibly led the jury to the conclusion that there could be, under the circumstances, liability without fault.

We submit that the doctrine of *res ipsa loquitur* does not apply in the present case upon the two grounds demonstrated by the plaintiffs own witnesses: first, that the truck could not have gotten away if parked where the only witnesses placed the truck, and second, that the alternative suggested by the plaintiffs' witness removed the case from the application of the doctrine.

In a case (not involving the *res ipsa loquitur* doctrine) the Supreme Court of Arizona says:

"When the definite and positive testimony of Whiting is placed on the scale, as we have said any presumptions disappeared, and the burden then shifted to plaintiff to produce some affirmative evidence of negligence which could be weighed by the jury as against the testimony of Whiting.

"In the case at bar the jury was not allowed to base a verdict on guess or surmise that negligence existed. An inference from physical facts to conflict with positive testimony sufficiently to raise a jury question must point definitely to a lack of care—the testimony in this case points conclusively in the other direction."

Barry v. Southern Pac. Co.
166 Pac. 2d 825, at page 830,

quoting Seiler v Whiting, *supra*.

The Instructions

The application of the *res ipsa loquitur* doctrine has already been discussed. If the contention of ap-

pellant as to the application is correct the giving of the instruction concerning *res ipsa loquitur* is undoubtedly prejudicial error.

However, for another reason appellant contends that the instruction as set out in the specification of error (T/R 190-191) is prejudicially erroneous. The first sentence of the instruction:

“From the happening of the accident involved in this case, *as established by the evidence*, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant.” (T/R page 190);

removes from the jury the question of whether the rule of *res ipsa loquitur* should be applied and, commenting on the evidence and the weight of the evidence instructs the jury that the doctrine must be applied: that is, the court invaded the province of the jury in the question of application. The jury could but believe from the instruction that the Court had considered the evidence on both sides of the case, and that under the evidence the jury *must* return a verdict against the defendant unless the weight of the evidence over came a *prima facie* case established by the plaintiffs. As indicated, appellant believes that the instruction was erroneous. In this connection appellant desires to direct the court's attention to defendant's requested instruction number two (T/R 19-20) the giving of which was refused by the trial judge. While appellant has not assigned the refusal to give defendant's requested instruction number two as error, we believe that the giving of the instruction would have corrected in part the instruction given by the trial court.

Appellant contends that the instruction as given by the Court at the request of the plaintiffs concerning

the applicability of the statute laws of Arizona regarding parking of a motor vehicle is fatally erroneous. The instruction at its best interpretation assumes as a matter of fact and evidence that the motor vehicle here in question was parked upon the highway of the State of Arizona. All of the positive evidence at the trial was contrary to this assumption.

Dewey A. Pennington testifying said:

Q. "While you were there (shortly before the accident) did you observe any truck in the vicinity of Peggy's Cafe?"

A. "Yes, I saw a truck sitting there at the west corner of the building."

Q. "What kind of a truck was it; that is, could you tell?"

A. "I don't know what make it was; but it was about a ton and a half truck."

Q. "Did it have anything connected with it in the way—a semi-trailer, or could you see that?"

A. "No, I didn't see any trailer."

T/R page 48

and on cross-examination Pennington says:

A. "I don't know what truck it was. I just saw one setting there." (T/R page 50)

This was slightly before the accident.

Thomas W. Atkins, a conductor for the Santa Fe testified on direct examination:

Q. "Do you know a place known as Peggy's Cafe, which was lighted up?"

A. "Yes, I am acquainted with that place."

Q. "Did you see that place?"

A. "I saw the place but I didn't go anywhere near that far."

Q. "With respect to the vicinity of Peggy's Cafe, how did these tracks run from the railroad?"

A. "Well, they ran in a general direction of Peggy's Cafe from the point where I found them on the track there."

and on cross-examination said:

Q. "You followed the tracks of the truck back where it was supposed to have been parked, did you?"

A. "In the general direction, only a short distance from the track."

Q. "How far?"

A. "Oh, I expect 20 or 30 feet."

The sum total of the testimony of the two Santa Fe employees was that one of them had seen a truck parked near Peggy's Cafe before the accident, and that the other had followed tracks from the scene of the accident twenty or thirty feet in the general direction of the "supposed" parking place. The two witnesses did nothing to establish the location of the truck prior to the accident.

Sam Marbell investigated the accident for the Arizona Highway Patrol, although the Patrol had no jurisdiction. He testified:

Q. "Yes. At the time, the information that I gathered and the inspection that I made led me to believe that the truck had been parked in the vicinity—

Mr. Struckmeyer: Just a minute.

Mr. Morgan: Go right ahead.

A. "I was making an investigation in an official capacity, and I made it my business to try to find out the details. My investigation disclosed that the truck was parked in the vicinity of what is known — what was known then as Peggy's Cafe, which would have been across the U. S. Highway 66, approximately 150 yards northeast of the scene of the accident."

Q. "Did you ascertain in what way it was parked? By that I mean was it pointed westward on the road or eastward?"

A. It was parked in a jackknife position, the cab headed—the front of the truck head west.

Q. On the north side of the road?

A. On the north side of the road.

Q. Would that be partly on the right of way?

A. Yes, it would, off the pavement.

Q. Now, from that point *where you ascertained* the car had been parked, can you tell the jury what the grades are, the contour of the country?"

(T/R 66-67)

Certainly his testimony added nothing to the proof attempted by the plaintiffs. On cross-examination Marbell testified:

Q. "Can you draw a diagram?"

A. "I believe I can."

Q. "I wish you would draw a diagram where it was parked. First draw Peggy's Cafe and the highway, I suppose."

(Thereupon the witness draws a diagram on the blackboard)

Mr. Struckmeyer, Sr.: "Now this one here you have marked 'garage', mark that 'A', will you please, so we may be sure about that."

(The witness complies.)

Q. "And 'B' is Peggy's Cafe."

(The witness complies)

Q. "All right. Now, the truck was parked where? Draw a diagram where the truck was parked."

(The witness complies)

Q. "And it was parked which way, facing which way?"

A. "Facing west."

Q. "Facing west?"

A. "Headed west."

Q. "It pointed toward the west and that is an open area, an alleyway?"

A. "Yes, sir. It is not an alleyway. It is an open area, but private property."

Q. "Private property?"

A. "Yes, sir."

Q. "What is immediately west of the garage?"

A. "Service station."

Q. "Mark that, please."

A. "(Complying) This is the building and this is the surrounding area."

Q. "You are positive that the truck was parked where you have indicated there, you are positive of that?"

A. "I didn't see the truck parked there, but my

investigation told me that the truck was parked there.”

(T/R 72-73)

On re-direct examination Mr. Marbell admitted that the reason he believed that the truck could not have been parked where the defendant's witnesses state positively it was parked because the truck could not have gotten away without an intervening agency if parked where the defendant's witnesses state that it was parked.

Q. “You were asked, Mr. Marbell, if this truck could have been parked down somewhere in this section and you said no, it could not have been. Will you explain why it could not have been parked there?”

A. “I could explain that.”

Q. “Go right ahead.”

A. “It had to do with the contour of the ground. The reason that it could not have been parked here—

Mr. Struckmeyer, Sr.: “Well—go ahead.”

A. “To be parked here is because the highway from the center line slopes to the north and to the south, and in order to—and at this point it slopes from the north to the south, and in order for the truck to have moved from this position or anywhere in the vicinity of this accident, which has a level driveway, perfectly level, practically as perfect as they could get it, would have to be under power to get over the hump in here and drop down here, a ways here. It could not possibly have moved from this point to here unless it was under power and being driven over it.”

(T/R 77-78)

and on re-cross examination Mr. Marbell reiterated his conclusion

Q. "The only reason you say the car was not parked over here in the garage area is because it could not have gotten away on its own power?"

A. "No, sir."

Q. "Unless somebody interfered with it, somebody set it in motion?"

A. "That is right."

Mr. Marbell admittedly knew nothing of the actual parking of the truck.

We believe that the foregoing quotations cover all of the evidence of the plaintiffs regarding the parking of the truck.

Conda Wilson, driver of the truck, was sworn in behalf of the defendant. On direct, he testified:

Q. "Now, where were you parked there with reference to that service station?"

A. "Right in front of the gas pumps on the outside next to the highway, but there was a sign, there was in the distance between the highway and the pavement where you drive into the gas station. The reason I didn't drive in the inside, there was a little roof over the inside of the plant and I couldn't get in there with the semi, and I pulled over on the outside so the light will reflect down in my motor when I check my oil."

Q. "That is why you stopped there to check your oil?"

A. "Always check the oil and gas when you stop. That was the main reason."

Q. "Then referring to this map, Exhibit C, can you point out there without paying any attention to this line here or this mark down there,

without paying any attention to that, can you point out where you were parked?"

A. "Right there where the X is."

Q. "Show it to the jury."

A. "Right there where the X is. This is the roof over the front end of the service station out in the first part of the service station where you drive in under a pump. There was a gas pump right in here and I parked right next to it, to the outside gas pump."

(T/R pages 134-135)

This is positive testimony, unrebutted by the conclusions drawn by Mr. Marbell, placing the defendant's truck at a point marked W-1 according to the black-board diagram on page 28 T/R. The testimony is repeated by Leonard J. Gore, driver of another truck.

Q. "Now, in the meantime when he came over to your truck, where was his truck parked?"

A. "He left it at the service station."

Q. "Right at the service station?"

A. "Right immediately in front of the gas pump."

(T/R page 164)

Mr. Gore's testimony placed the truck at the same point testified to by Conda Wilson, that is, W-1, T/R page 28.

To recapitulate: One of the plaintiffs' witnesses saw a truck near Peggy's Cafe. Another of the plaintiffs' witnesses followed the tracks of the truck involved in the accident for twenty or thirty feet and the final witness for the plaintiffs admitted that he had concluded that the truck was parked near Peggy's Cafe only because the truck could not have moved from the spot

near the service station without an intervening agency.

The instruction itself assumed as a matter of fact and as a matter of law that the truck was parked near Peggy's Cafe *on the highway*. The instruction advised the jury that any violation of the provisions of the statute was negligence as a matter of law (T/R 189). The instruction invaded the province of the jury, constituted comment on the evidence and the weight of the evidence by the trial judge, and established negligence as a matter of law. It is prejudicially erroneous.

It is well settled in the State and Federal courts that an instruction is improper which assumes the existence of a fact which under the evidence is an issue for the jury.

It is seen that the instruction complained of assumed a fact which was at the best controverted. Mr. Justice Field in *Knickerbocker Life Insurance Company of N. Y. v. Foley*, 15 Otto 350-355, 105 U. S. 350-355, stated the law as follows:

“No instruction should be given which thus assumes, as a matter of fact, that which is not conceded or established by uncontradicted proof.”

The rule is basic and we do not deem it necessary to cite further cases in support of our contention.

The instruction was erroneous in that it assumes a fact in controversy, and based on the assumption, instructed the jury that the defendant's employee was negligent as a matter of law.

CONCLUSION

Appellant submits that this case should be reversed upon any and all of the three principal grounds urged

by the appellant. Appellant submits also that the case should be remanded with instructions to enter judgment in favor of the defendant upon defendant's motion for judgment notwithstanding the verdict and motions for directed verdict.

Respectfully submitted,

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IN THE

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For the Ninth Circuit**

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Appellees.

BRIEF FOR APPELLEES.

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FILED

1948

PAUL R. GRIFFIN



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No. 11,964

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FRANK L. CHRISTENSEN,	} <i>Appellant,</i>
VS.	
CHARLES LEE TROTTER and JOHN S. RAYBURN,	} <i>Appellees.</i>

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

These two actions were instituted by the appellees, hereinafter called plaintiffs, to recover damages for personal injuries which they sustained when the train on which they were working came into collision with a truck owned by the defendant. The plaintiffs were Fireman and Engineer, respectively, on the second engine of the train when it collided with the truck of the defendant. Verdicts were returned by the jury in favor of the appellees, and judgment was entered in accordance with the verdicts. Thereafter the appellant filed a motion for a new trial which was heard and denied by the trial court.

The appellant has made three specifications of error: (1) That the trial court erroneously excluded from evidence complaints filed by the plaintiffs against The Atchison, Topeka and Santa Fe Railway Company for the same injuries that the present actions involved; (2) That the trial court was in error in instructing the jury upon the doctrine of *res ipsa loquitur*; (3) That the trial court gave an erroneous instruction based upon the statutes of Arizona relating to parking of motor vehicles on the highway. These points will be taken up in the above order.

The appellant has not made a detailed statement of the facts surrounding the happening of the accident in question. We feel that the court will have a better understanding of the situation if the facts are set forth together with all reasonable inferences to be drawn therefrom in disregard of any adverse showing made by the appellant. This is in accordance with established law.

“If, disregarding all adverse evidence and giving credit to all evidence favorable to him and indulging in every legitimate conclusion favorable to him which may be drawn from the facts proved, it supports the verdict, the verdict must be sustained.”

Henwood v. Neal, 198 S.W. (2d) 125.

FACTS.

The plaintiff Charles Lee Trotter was the fireman, and the plaintiff John S. Rayburn was the engineer on the second engine of the second section of number

three train that was proceeding into Kingman, Arizona, at about 1:20 A.M. on March 24, 1944, traveling in a westerly direction. (T.R. p. 84.) The engineer in the first or lead engine had control of the two engines. (T.R. p. 104.) About a mile east of the Kingman station with the train traveling at a speed of about 30 miles an hour (T.R. p. 94), the plaintiff Trotter saw a truck on the tracks (T.R. p. 84) which was directly across the rails and was headed in a southerly direction. (T.R. p. 90.) No road crossed the tracks at that point. (T.R. p. 92.) Trotter hollered to the engineer, the plaintiff Rayburn, that there was a truck on the tracks (T.R. p. 84), and Rayburn looked out and saw the truck and reached for the emergency brake, but by that time the engineer in the lead engine had already applied the air. (T.R. p. 105.) The lead engine struck the truck, and the second engine occupied by the plaintiff was derailed, and the lurching of the engine after derailment caused Rayburn to be thrown out the cab window (T.R. pp. 105, 106), and Trotter to be pinned between the cab and tank of the second engine. (T.R. pp. 84, 85.)

The truck and trailer that caused the accident was owned by the appellant, Frank L. Christensen, hereinafter called defendant. The truck was in the control of and was operated by Conda Wilson, an employee of the defendant. He was acting in the regular course and scope of his employment at all times. (T.R. p. 53.)

Conda Wilson had delivered a load of sheep in the neighborhood of Kingman and had driven back into

Kingman and stopped to get a cup of coffee at a little restaurant called Peggy's Cafe. (T.R. pp. 142, 143.) From this cafe to the point where the truck and trailer were across the railroad tracks was a distance of 395 feet (T.R. p. 130) and the Cafe was 13 feet higher in elevation. (T.R. p. 130.) Highway 66 parallels the railroad tracks at the scene of the accident to the north of the tracks, and Peggy's Cafe is on the north side of the highway. Both the railroad tracks and the highway extend in a general easterly and westerly direction. (T.R. pp. 47, 48.)

Before going into Peggy's Cafe, Wilson parked the truck and trailer in a jack-knifed position at the southwest corner of the Cafe, headed west (see diagram, T.R. p. 28, and p. 72), and on the highway right of way. (T.R. pp. 78, 67, 80.) From the point where the truck was parked to where the accident occurred, the ground slopes in a general southwesterly direction (T.R. p. 59); so that if a vehicle started to roll, it would cross the highway and roll southwesterly to the railroad tracks. (T.R. pp. 67, 68.) Tire marks from the point where the truck was on the railroad rails extended back in a general northeasterly direction toward Peggy's Cafe. (T.R. pp. 58, 59.) When Wilson came out of the Cafe after having a cup of coffee, he found that the truck was gone, and he went down to the railroad tracks and found that the truck he had parked was the one that had been struck by the train. (T.R. p. 146.) The explanation given by Wilson for the truck getting away was that the air brakes had leaked. (T.R. pp. 183, 184.)

ARGUMENT.

- (1) **THE TRIAL COURT PROPERLY EXCLUDED FROM EVIDENCE THE COMPLAINTS FILED BY THE PLAINTIFFS AGAINST THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.**

The complaints that were offered in evidence did not contain any statement that was inconsistent with their testimony on the witness stand. There was no statement that was made by the plaintiffs on the stand that appellants offered to impeach or contradict by anything alleged in the complaints on file against The Atchison, Topeka and Santa Fe Railway Company. All that the complaints charged was that The Atchison, Topeka and Santa Fe Railway Company was also guilty of some negligence that contributed to the happening of the accident.

It is well established that the law does not seek to recognize only one proximate cause of an injury, consisting of only one factor, one act, one element or circumstance or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause.

Consequently, when one feels that he has been injured by the negligent conduct of one or more persons, he can sue either or both, and he can sue them jointly or severally (38 Am. Jur. 946 § 257, Negligence) without there being any inconsistency in the statements in his pleadings.

“In an action for injury alleged to be due to a neglect of duty on the part of the defendant, it is no defense that a similar duty rested upon another person. The negligence of one person is in no sense justified by the concurring negligence of another.”

38 *Amer. Jur.* 716, Section 64, Negligence.

Further, the complaints were not verified by the plaintiffs nor had they seen the pleadings. The pleadings were prepared, signed and verified by counsel. (T.R., pp. 99, 101, 116) :

Q. Did you, Mr. Trotter, actually sign this pleading that is referred to by counsel; did you sign and swear to it?

Mr. Struckmeyer. No it is not so contended. It is verified by his attorney.

(T.R. p. 99.)

Q. Did your attorneys in California show you a copy of the complaint which had been filed.

A. A copy of what?

Q. A copy of the pleadings that had been filed.

A. No, they have not.

Q. They didn't, but you gave them in answer?

A. All that I had.

(T.R. p. 101.)

Q. (of Mr. Rayburn). And do you know on what grounds that suit was based?

A. No, sir.

(T.R. p. 116.)

The Federal rule in such a situation is that “as a condition of admissibility, the statement (contained

in such complaint) must be proximately connected with the party as one which he has made because it was true." See *Delaware County v. Diebold Safe etc. Co.*, 133 U.S. 473, 10 S. Ct. 399, 33 L. Ed. 674, where it was said:

"* * * and the former complaint, not under oath, nor signed by the plaintiff, but only by its attorneys was clearly incompetent to prove an admission by the plaintiff that upon those facts it had not a cause of action against this defendant."

10 S. Ct. 403.

The rule as stated in 22 C.J. p. 355, section 376, *Evidence* and supported by numerous authorities is as follows:

"* * * but the more generally accepted view recognizes a distinction between statements contained in pleadings in another case which are emanations of counsel and those which can fairly be regarded as statements by the party, and as a result, requires, as a condition of admissibility, that the statement be affirmatively connected with the party as one which he has made because it was true."

The trial court was clearly correct in excluding the complaints from evidence for two reasons: first, because there was nothing inconsistent or contradictory in the pleading that would impeach the testimony given by the plaintiffs, and second, the complaints were not signed or verified by the plaintiffs, and they did not know what was charged in the complaints.

- (2) **THE COURT DID NOT COMMIT ERROR IN INSTRUCTING THE JURY UPON THE DOCTRINE OF RES IPSA LOQUITUR AND GAVE A PROPER INSTRUCTION UPON THAT DOCTRINE.**

The evidence showed that the driver operating the defendant's truck parked the truck at a point where if it started from any cause, it would roll to the very point that it did.

Q. (of witness Atkins). With respect to the vicinity of Peggy's Cafe, how did these tracks run from the railroad?

A. Well, they ran in a general direction of Peggy's Cafe from the point where I found them on the track there.

Q. Are you familiar with the contour of the ground there? By that, I mean how it slopes.

A. Fairly well, yes. It has a slope in a south-westerly direction there.

Q. Well, from the vicinity of this cafe, you mean across the road?

A. Yes, to the track.

(T.R. pp. 58, 59.)

Q. (of witness Marbell). A car or truck of the kind and character involved in this accident, parked in the vicinity of Peggy's Cafe, if the brakes became loosened for some reason, it would be the natural thing to roll down in that direction and upon the tracks?

A. Yes, it would.

(T.R. p. 68.)

The plaintiffs' witness, Dewey A. Pennington, saw the truck parked at the west corner of Peggy's Cafe and headed west.

Q. While you were there did you observe any truck in the vicinity of Peggy's Cafe?

A. Yes, I saw a truck sitting there at the west corner of the building.

(T.R. p. 48.)

Sam Marbell, one of the State patrolmen who investigated the accident, testified on behalf of plaintiffs and stated that it was determined from his investigation that the truck was parked at the southwest corner of Peggy's Cafe, in a jackknife position, headed west.

Q. Did you ascertain in what way it was parked? By that I mean was it pointed westward on the road or eastward?

A. It was parked in a jackknife position, the cab headed—the front of the truck head west.

(T.R. p. 67.)

Q. All right. Now, the truck was parked where? Draw a diagram where the truck was parked.

(The witness complies.)

Q. And it was parked which way, facing which way?

A. Facing west.

Q. Facing west?

A. Headed west.

(T.R. p. 72, see T.R. p. 28 for diagram showing location of parked truck.)

The driver of the truck testified that the truck was left in forward overdrive.

Q. In what gear did you put it?

A. Well, the Eaton was in overdrive, and the Brownie, I believe, was in overdrive.

Q. They were both in forward overdrive?

A. Yes, sir.

(T.R. p. 144.)

The wheels of the truck were not turned or cramped.

(See diagram T.R. p. 28.)

Mr. Wilson further testified that he set all the brakes.

Q. Now, in addition to that you put on your air brake?

A. Pulled on the air brake.

Q. You put on your air brake?

A. I set the air brake before I even tried anything else.

Q. Well, you set the air brake?

A. Yes, sir.

Q. And you pulled on the mechanical brake?

A. The emergency brake, yes, sir.

(T.R. p. 145.)

Under these facts, the plaintiffs were entitled to the benefit of the *res ipsa loquitur* doctrine. The exclusive control of the truck was in the hands of the defendant's employee, Conda Wilson. All that the plaintiffs could show was where the truck was parked, that it would roll from that point to the scene of the accident, and that unattended it did roll onto the tracks of the railway company. The plaintiffs had no way of proving specific acts of negligence, and certainly if the truck had been parked carefully, it would not have run down the grade.

The law covering this situation is very ably stated in California Jurisprudence Supplement Vol. 2, page 243, § 162:

“Where the evidence shows that the defendant’s vehicle was parked on an incline down which it ran unattended, the plaintiff is entitled to recover, apparently, although there is nothing to show a specific act or omission on the part of the defendant. The implication from the facts is that the defendant did not take precautionary measures in the matter of the setting of the emergency brake, engaging the gears or turning the wheels toward the curbing. If he testifies that he did set the brake, the inference is that the brake was not adequate; and if it appears—for example, from tests that were made after the happening of the collision—that the brakes were adequate, the implication is that they were not properly set.”

The facts as developed by the plaintiffs presented a clear situation where the *res ipsa loquitur* doctrine was applicable. It is the law that the *res ipsa loquitur* doctrine applies where a motor vehicle, after being parked on a grade, runs down the grade and causes injury. See Annotation, 66 A.L.R., 441-443, *American Express Company v. Terry*, 126 Md. 254, 94 Atl. 1026, Ann. Cas. 1917C, 650, and *Biller v. Meyer*, C.C.A. 7, 33 Fed. (2d) 440, 66 A.L.R. 436, where it is said:

“The negligence of defendant, whose automobile, shortly after being parked on a grade, started down the hill and injured the plaintiff, is for the jury under the doctrine of *res ipsa loquitur*, although the defendant testified that he had set the brakes and put the gear in reverse.”

See also *Price v. McDonald*, 7 Cal. App. (2d) 77, where the Court states:

“We are of the opinion that under such allegations a presumption of negligence arises when an unattended automobile coasts down a hill and that upon proof of these facts, it becomes incumbent upon the person having control to explain the cause of the car’s movement. Defendants in the case at bar did not relieve themselves from liability by mere proof that they safely parked the car. Their testimony to that effect enables them to argue with plausibility that some one else must have interfered with the car but that argument was one for the jury and does not constitute a sufficient defense in the absence of all evidence that such was the fact. We are of the opinion that the case made by the plaintiff satisfactorily establishes all of the elements necessary to bring into operation the doctrine of *res ipsa loquitur*.”

There was evidence in the record that would support a finding that the reason for the truck rolling down onto the railroad tracks was that the brakes were, in fact, defective. Officer Marbell testified that Mr. Wilson, the driver of the truck, told him that the only reason he could account for the truck getting away was that the air had leaked out of the brakes.

The Court. All right, what did he (Conda Wilson) say at that conversation?

A. The driver stated that the only reason he could find for it (the truck) getting away was the fact that he lost his air.

(T.R. pp. 183, 184.)

The appellant cites no cases contrary to the above authority. Appellant also overlooks the fact that there was a conflict in the evidence as to the point where the truck was parked; and he fails to recognize the rule that all adverse testimony is to be disregarded on appeal. The cases relied upon by the appellant present situations where the uncontradicted evidence showed no liability.

The instructions that were given upon the doctrine of *res ipsa loquitur* are as follows:

“From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiffs. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he did, in fact, exercise ordinary care and diligence, or that the accident occurred without being proximately caused by any failure of duty on his part.

“The instruction just given may appear to constitute an exception to the general rule, that (196) the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows:

“**First:** The fact that some certain instrumentality, by which injury to the plaintiffs was proxi-

mately caused, was in the possession and under the exclusive control of the defendant at the time the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act or omission incident to defendant's management.

"Second: The fact that the accident was one of such nature as does not happen in the ordinary course of things, if those who have control of the instrumentality use ordinary care.

"Third: The fact that the circumstances surrounding the causing of the accident were such that the plaintiffs were not in a position to know what specific conduct was the cause, whereas, the one in charge of the instrumentality may reasonably be expected to know and be able to explain the precise cause of the accident.

"When all these conditions are found to have existed, the inference of negligence to which they (197) give birth will support a verdict for the plaintiffs in the absence of a showing by the defendant that offsets the inference."

(T.R. pp. 190, 191.)

These instructions clearly state the doctrine of *res ipsa loquitur*. They do not say, as counsel contends, that the court instructed the jury that they must return a verdict against the defendant. All these instructions did was to carefully outline a situation where the doctrine applied and told the jury that under such facts an inference arose which would support a verdict. The jury was further instructed that at all times it was the burden of the plaintiffs to establish negligence upon the part of the defendant by a preponderance of the evidence.

"If you believe from the evidence that the driver of the truck in question exercised ordinary and reasonable care in parking the truck, and that he took such steps as an ordinary and reasonably prudent person would take to safeguard the said truck against moving, then in that event you shall return a verdict for the defendants.

"I further charge you that if the defendants, acting through the driver of his truck, exercised reasonable and ordinary care as I heretofore defined to you, in the parking of the truck, and though said truck thereafter, through external (200) cause not shown by the evidence, came to rest on the tracks of the Santa Fe Railway Company, then it is your duty to find a verdict for the defendant. In other words, it is not the duty of the defendants to explain or show the reason why their truck came upon the tracks of the Santa Fe Railway Company, but it is the duty of the plaintiffs to prove by a preponderance of the evidence that this truck came upon the track of the Santa Fe Railway Company through the negligence of the defendant."

(T.R. pp. 193, 194.)

The instructions upon the doctrine of *res ipsa loquitur* were those contained in California Jury Instructions, Civil Instruction 206B and 206C at pages 321 and 322, each of said instructions being supported by innumerable authorities. Under the evidence and the law, the instruction upon the doctrine of *res ipsa loquitur* was properly given by proper instructions.

(3) The trial court did not commit error in giving instructions based upon Arizona statutes dealing with the parking of automobiles on the highway.

The following is the instruction complained of:

“I instruct you that the laws of Arizona, Section 66-118, A.P.A. 1939, provide:

“‘No person having control or charge of a motor vehicle shall allow it to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor, and when standing upon any grade without turning the front wheels to the curb or side of the driveway.’

“If you should find from the evidence in this case that C. E. Wilson, the driver of the truck involved in this accident, failed to comply with the provisions of the section just read to you and that he left said truck unattended, without first effectively setting the brakes thereon, or without turning the front wheels to the curb or side of the roadway, you are instructed that such failure constitutes negligence as a matter of law.

“However, in this action, a violation of this law would not be of any consequence unless it was the proximate cause or contributed in some degree as a proximate cause to the injuries found by you to have been suffered by the plaintiffs, or either of them, in the event you so find they have suffered injuries.”

(T.R. p. 189.)

Appellant's contention that there is no evidence justifying the giving of the instruction is wholly without merit. Plaintiffs introduced ample testimony from which the jury could have found that the truck was parked on the highway within the meaning of the Arizona statute, Section 66-118, A.P.A. 1939. The testimony of Officer Marbell shows positively that the

defendant's truck was parked on the highway right of way. (T.R. pp. 78, 79.)

Q. Did you ascertain in what way it was parked? By that I mean was it pointed westward on the road or eastward?

A. It was parked in a jackknife position, the cab headed—the front of the truck head west.

Q. On the north side of the road?

A. On the north side of the road.

Q. Would that be partly on the right of way?

A. Yes, it would, off the pavement.

(T.R. p. 67.)

Q. Now, referring again to the sketch that you made, Mr. Marbell, in which you place the truck itself apparently towards the highway. Would that be within the boundaries of the highway, the truck?

A. You mean the right of way?

Q. The right of way.

A. Yes.

(T.R. p. 78.)

This testimony clearly discloses that the truck was not only operated upon the highway but was parked upon the highway within the contemplation of the Arizona statutes and was in a place open to the public as a matter of vehicular travel.

(See diagram T.R. p. 28.)

Section 66-401, A. C. A. 1939, defines highways as follows:

“Highway means any way, road or place of any nature open to the use of the public as a matter of right for the purpose of vehicular travel.”

The above testimony showed that the truck belonging to the defendant was parked in a place open to the use of the public and use for the purpose of vehicular traffic. Even if we assume that the truck was parked where Mr. Wilson stated that he parked it, it would still be on the highway right of way and in a place open to the use of the public and as a matter of vehicular travel. The instruction as given contained all of the elements required. See *Valley Transp. System v. Reinhartz*, 197 Pacific (2d) 269.

Under the evidence showing that the truck was parked on the highway right of way, the instruction as given was proper in order to submit the entire issue of fact to the jury.

CONCLUSION.

It is respectfully submitted that there was no error committed by the trial court either in excluding the evidence or in instructing the jury and that there was ample evidence which was the basis for the verdict of the jury, and plaintiffs respectfully urge that the judgments be affirmed.

Dated, Oakland, California,
November 1, 1948.

Respectfully submitted,

HILDEBRAND, BILLS & McLEOD,

By D. W. BROBST,

Attorneys for Appellees.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK L. CHRISTENSEN,
Appellant,

vs.

CHARLES LEE TROTTER and
JOHN S. RAYBURN,
Appellees.

No. 11,964

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Appellant deems it unnecessary, in replying to appellee's brief, to discuss again the authorities cited in Appellant's Opening Brief, inasmuch as they are not challenged by Appellee. Appellant, however, earnestly insists the appellee has completely misinterpreted the evidence as shown in the record.

Henwood v. Neal, 198 S. W. (2d) 125 (Court of Civil appeals of Texas) cited by appellee is, of course, a correct statement of the law regarding the sufficiency of the evidence when an appeal is bottomed on the sufficiency of the evidence to support a verdict. However, the appellant does not raise the question of the **sufficiency** of the evidence, but does earnestly insist that there is **no** evidence to support the verdict.

APPELLEE'S "STATEMENT OF FACTS"

Appellees statement of facts assumes as proved those facts which are necessary to the proof. Thus appellee states:

"Before going into Peggy's Cafe, Wilson parked the truck and trailer in a jack-knifed position at the southwest corner of the Cafe, headed west (see diagram, T. R. p. 28, and p. 72), and on the highway right of way."

Appellee's Brief, page 4.

Such calm assumption of unproven facts is not justified. In the same paragraph appellee notes:

“Tire marks from the point where the truck was on the railroad rails extended in a general northeasterly direction toward Peggy’s Cafe.”

Appellee’s Brief, page 4.

We submit that the tire marks also extended in the general direction of Montana, Canada, and possibly Russia. The basic fallacy of the appellee’s case is demonstrated by the last quoted argument that certain tire marks extended in a general northeasterly direction. Peggy’s Cafe was in a general northeasterly direction. Ergo, the tracks lead to Peggy’s Cafe!

Based upon this conclusion, appellee argues that despite the undisputed positive evidence to the contrary, the jury was entitled to believe that the truck was parked at Peggy’s Cafe. Following the same illogical sequence, and having reached this conclusion, appellee states that the truck was parked at Peggy’s Cafe **off the highway**. Then, if the truck, having been placed by tire marks extending in a general northeasterly direction at Peggy’s Cafe, off the highway, was found later on the railroad tracks, appellee argues that the Court may again conclude that negligence of the truck driver was the cause of the truck being on the railroad right of way. The whole of appellee’s case is based on the glittering premises to be drawn from the fact appellant’s truck was in fact on the railroad right of way.

APPELLEE'S ARGUMENT

Appellee again incorrectly assumes facts in argument concerning the complaints filed against the Atchison, Topeka and Santa Fe Railway Company. It is not true that the complaints only charged contributory negligence on the part of the Atchison, Topeka and Santa Fe Railway Company. The complaints charge that the sole cause of the accident complained of was the negligence of the Atchison, Topeka and Santa Fe Railway Company.

We do not quarrel with appellee's statement of the law as set forth in American Jurisprudence. The statement of the law is in no sense justified by the fact situation herein.

It may be possible that attorneys familiar with negligence cases find extended conferences with clients a bother prior to filing suit. Such, apparently, is the case here. Yet, the complainants gave their attorneys "all they had." Based on this information, the attorneys filed complaints against the Atchison, Topeka and Santa Fe Railway Company, and verified them. We believe that the complaints are pleadings "which can fairly be regarded as statements by the party," and should have been admitted as such.

RES IPSA LOQUITUR

Appellee's argument concerning *res ipsa loquitur* is based upon incorrect statements of the facts. Appellee states:

"The plaintiff's" witness, Dewey A. Pennington, saw the truck parked at the west corner of Peggy's Cafe and headed west."

Appellee's Brief, page 8

Dewey A. Pennington did not so testify.

Sam Marbell's testimony was based upon the admitted fact that he did not believe the truck drivers' testimony, because if the drivers testified correctly the truck could not have gotten away without outside interference. All of Marbell's testimony, as pointed out in Appellant's Opening Brief, is a conclusion based on a conclusion.

Under appellee's theory of the case it is impossible and would be impossible to prove as an affirmative proposition that the getting away of an unattended automobile was not negligence. The truck was not under the control and not under the exclusive possession of the appellant as is clearly shown by the evidence.

Appellant does not "overlook the fact that there was a conflict in the evidence as to the point where the truck was parked." There is no conflict in the evidence as to the point where the truck was parked. There is no conflict in the evidence, and there is no evidence in the record, from which the jury was entitled to assume that the truck was parked any place other than that testified to by the two disinterested eye-witnesses.

Appellee states that the cases relied upon by the appellant present situations where the uncontradicted evidence showed no liability. Inasmuch as the distinctions are not pointed out, appellant will not argue the appellee's charge, but must admit the truth of the accusation: appellant **does** rely upon cases where the uncontradicted evidence shows no liability.

THE INSTRUCTIONS

The judge's instruction predicates itself on the fact that an instrumentality "was in the possession and under the exclusive control of the defendant at the time the cause of injury was set in motion." It has been appellant's contention throughout the trial of this cause, and it is now appellant's contention, that the uncontradicted evidence proves that the instrumentality of this case was not in the possession of and was not under the exclusive control of the defendant at the time the cause of injury was set in motion. The testimony of Sam Marbell as quoted in appellant's opening Brief conclusively demonstrates according to the appellee's own theory of the case that the instrumentality was set in motion by an intervening agency. Under the circumstances the giving of the instruction was erroneous.

PARKING ON THE HIGHWAY

It is impossible to reply to appellee's argument on the proposition that the truck was parked on the highway. It must be apparent that even if the appellee is permitted to

base an inference upon an inference upon an inference, the truck cannot be placed upon the highway as defined by the Arizona Code. Highway, as understood by the Code, is a place open to the use of the public as a matter of right for the purpose of vehicular traffic. The parking lot at Peggy's Cafe and the canopy of the service state are not places open to the public for the use of vehicular traffic. The instruction assumes that they were and so charged the jury.

Inasmuch as appellee does not argue the error of the giving of the instruction, appellant will not further argue the point.

CONCLUSION

Upon the errors pointed out in the appellant's Opening Brief, and upon the record, appellant earnestly insists that the Court must reverse the lower court and remand with instructions to dismiss.

Respectfully submitted,
STRUCKMEYER &
STRUCKMEYER.

By: F. C. STRUCKMEYER,
Attorneys for Appellant.

No. 11965
IN THE
United States Court of Appeals
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LANE-WELLS COMPANY, a corporation,
Appellant,

vs.

M. O. JOHNSTON OIL FIELD SERVICE CORPO-
RATION,
Appellee.

M. O. JOHNSTON OIL FIELD SERVICE CORPO-
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TRANSCRIPT OF RECORD

(In 3 Volumes)

VOLUME I

(Pages 1 to 224, Inclusive)

Appeals From the District Court of the United States
for the Southern District of California,
Central Division

FEB 9 1949

PAUL P. O'BRIEN, /



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(In 3 Volumes)

VOLUME I

(Pages 1 to 224, Inclusive)

Appeals From the District Court of the United States
for the Southern District of California,
Central Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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In the District Court of the United States
Southern District of California
Central Division

Civil Action No. 5295-WM

M. O. JOHNSTON OIL FIELD SERVICE CORPO-
RATION, a corporation,

Plaintiff,

vs.

LANE-WELLS COMPANY, a corporation,

Defendant.

COMPLAINT

Comes now M. O. Johnston Oil Field Service Corporation, a corporation, plaintiff above named, and for cause of action against defendant Lane-Wells Company, a corporation, alleges:

I.

That the plaintiff M. O. Johnston Oil Field Service Corporation is a corporation duly organized and existing under the laws of the State of California, having its principal place of business at Los Angeles, California. [2]

II.

That the defendant Lane-Wells Company is a corporation duly organized and existing under the laws of the State of Delaware, having a place of business in the County of Los Angeles, State of California, and has designated an agent in the City of Los Angeles, County of Los Angeles, State of California, for service of process in conformity with the laws of the State of California.

III.

That this Court has jurisdiction because:

(a) this Complaint is founded on the patent laws of the United States concerning the validity of Letters Patent of the United States, and the question of their infringement by acts of the plaintiff;

(b) the plaintiff and the defendant are residents of different states and the amount in controversy is in excess of Three Thousand Dollars (\$3,000.00).

Jurisdiction is also conferred by Section 274D of the Judicial Code (Federal Declaratory Judgments Act, Title 28, Section 400 U. S. C.).

IV.

That it appears from the records of the United States Patent Office that on the 4th day of February, 1936, Letters Patent of the United States No. 2,029,491 were granted and issued to The Technicraft Engineering Corporation for Gun Type Formation Tester, and that subsequent to said grant and issuance said grantee duly assigned said Letters Patent to the defendant Lane-Wells Company, and that said defendant Lane-Wells Company, since the assignment, has been and now is vested with the legal title to said Letters Patent No. 2,029,491. Plaintiff hereby makes profert of a certified copy of the said Letters Patent of the United States. [3]

V.

That it appears from the records of the United States Patent Office that on the 7th day of September, 1937, Letters Patent of the United States No. 2,092,337 were granted and issued to The Technicraft Engineering Corporation for Formation Testing Apparatus, and that sub-

sequent to said grant and issuance said grantee duly assigned said Letters Patent to the defendant Lane-Wells Company, and that said defendant Lane-Wells Company, since the assignment, has been and now is vested with the legal title to said Letters Patent No. 2,092,337. Plaintiff hereby makes profert of a certified copy of the said Letters Patent of the United States.

VI.

That plaintiff M. O. Johnston Oil Field Service Corporation has been for many years and now is engaged in the business of designing, manufacturing, selling and operating special tools for use in connection with formation testing and sampling in oil well bores and in gun devices for perforating the casing of oil well bores, and that prior hereto, at great expense, designed and developed an apparatus for perforating the casing in an oil well bore and thereafter entrapping a sample of well fluid entering the casing through the perforations so formed, which apparatus is known as the Johnston Perforator and Formation Tester. That plaintiff has heretofore spent large sums of money in producing said apparatus in commercial quantities and now has a substantial investment therein and intends to continue to manufacture said apparatus in large and constantly increasing quantities and is now so engaged. That plaintiff has built a large and profitable business in the operation and use of said apparatus and a valuable good will in connection therewith, which business is constantly increasing. That plaintiff further alleges that its ability to continue to manufacture the said device and commercially operate and use the same in [4] oil wells is of great importance to plaintiff and to the oil industry.

VII.

That in the event that claims numbered 7, 8, 9, 11, 12, 13 and 14 of Letters Patent No. 2,029,491 and claims 5, 7, 9, 10, 13, 14, 15 and 18 of Letters Patent No. 2,092,337 are valid and interpreted and applied literally as worded, that the same can be read upon the Johnston Perforator and Formation Tester manufactured, operated and used by this plaintiff and would be infringed thereby.

VIII.

That the defendant Lane-Wells Company has at all times held out to the public, and is now so holding out, that said United States Letters Patent Nos. 2,029,491 and 2,092,337 are valid and of a scope of sufficient breadth to include apparatus such as the said Johnston Perforator and Formation Tester manufactured, operated and used by this plaintiff, as aforesaid.

IX.

That due to this holding out of the aforesaid patents to the public as being valid and of a scope sufficient to include apparatus such as the said plaintiff's Johnston Perforator and Formation Tester, plaintiff is informed and believes and on information and belief alleges that many oil well operators will refuse to use plaintiff's said Johnston Perforator and Formation Tester because of a fear that an action for infringement of the aforesaid patents may be brought against them. That, therefore, the existence of said patents and the holding out thereof as of a scope and valid, as aforesaid, has been and will continue to constitute a restraint on the development of plaintiff's business in the said Johnston Perforator and Formation Tester, all to plaintiff's damage.

X.

That the existence of an opposing claim based upon the [5] aforesaid Letters Patent of the United States against plaintiff disturbs the peace and freedom of plaintiff in its business in connection with said Johnston Perforator and Formation Tester and places plaintiff in a position of uncertainty and doubt as to its legal position with respect to said patents, and impairs or jeopardizes its pecuniary interests in its business in connection with said Johnston Perforator and Formation Tester.

XI.

Plaintiff is informed and believes and, therefore, on information and belief alleges that said defendant Lane-Wells Company will delay bringing action for infringement against plaintiff under said patents until large potential damages are built up by plaintiff in its business in connection with said Johnston Perforator and Formation Tester, thus placing plaintiff in a position of uncertainty and jeopardy with respect to said business.

XII.

That there is a substantial and actual controversy between plaintiff and defendant Lane-Wells Company as to the validity and scope of the aforesaid Letters Patent Nos. 2,029,491 and 2,092,337, and as to their infringement by plaintiff and plaintiff's customers and dealers in plaintiff's aforesaid Johnston Perforator and Formation Tester. That plaintiff has no other adequate and complete remedy than by this petition for a declaratory judgment to deter-

mine the respective rights of plaintiff and defendant with respect to the questions of validity and infringement of the aforesaid Letters Patent Nos. 2,029,491 and 2,092,337, and thereby to determine the respective rights of plaintiff and defendant so that such determination will be res adjudicata and final as between plaintiff and defendant.

XIII.

That plaintiff is informed and believes and on information and belief alleges that said patents Nos. 2,029,491 and [6] 2,092,337 are invalid in that the things alleged to be described and patented in and by said patents were not inventions and did not require the, or any, exercise of the inventive faculty for their production and were not patentable, and that, therefore, said alleged patents Nos. 2,029,491 and 2,092,337 are null and void and of no effect.

XIV.

That plaintiff is informed and believes and on information and belief alleges that said patents Nos. 2,029,491 and 2,092,337 are invalid in that the things alleged to be described and patented in and by said patents are inoperative.

XV.

Plaintiff is informed and believes and on information and belief alleges that said patents Nos. 2,029,491 and 2,092,337 are invalid in that the things purportedly patented thereby are not distinctly pointed out, described and claimed, as required by the statutes of the United States.

XVI.

That plaintiff is informed and believes and on information and belief alleges that said patents Nos. 2,029,491 and 2,092,337 are invalid, particularly as to claims 7, 8, 9, 11, 12, 13 and 14 of patent No. 2,029,491 and claims 5, 7, 9, 10, 13, 14, 15 and 18 of patent No. 2,092,337, in that said claims are vague, ambiguous and do not define or distinctly claim the alleged invention, as required by the statutes of the United States.

XVII.

That plaintiff is informed and believes and on information and belief alleges that said patents Nos. 2,029,491 and 2,092,337 are null, void and of no effect because of double patenting.

XVIII.

That plaintiff is informed and believes and on information and belief alleges that each and every material and substantial [7] part of the apparatus and things pretended to be patented by the said defendant's Letters Patent Nos. 2,029,491 and 2,092,337 had been invented, known and publicly used, and had been on public sale and sold and had been known and used by various persons, firms and corporations and in various sundry places in the United States of America for more than two years prior to the date of the applications for said Letters Patent, the exact names and locations of which are at present unknown to plaintiff but which names and places plaintiff prays leave to insert herein by amendment when ascertained.

XIX.

That plaintiff is informed and believes and on information and belief alleges that the person or persons named as the inventor or inventors in said Letters Patent Nos. 2,029,491 and 2,092,337 are not the first, or any, inventor or inventors of the things disclosed in said Letters Patent and that, therefore, said Letters Patent are invalid.

XX.

That plaintiff is informed and believes and on information and belief alleges that the defendant is estopped by the proceedings in the United States Patent Office in the matter of the applications of the applicants for said Letters Patent Nos. 2,029,491 and 2,092,337, and the acquiescence of said applicants in and to the rulings and rejections of the Commissioner of Patents in the negotiations for said Letters Patent, and in and by the limitations imposed thereby during the negotiations in the United States Patent Office leading up to the grant and issuance of said Letters Patent, from claiming any scope or subject matter of said alleged Letters Patent, or any of the claims thereof, as would comprehend or embrace any apparatus or devices manufactured, sold or used by this plaintiff. [8]

XXI.

That plaintiff is informed and believes and, therefore, on information and belief alleges that its said Johnston Perforator and Formation Tester, aforesaid, or any of the uses thereof, do not infringe the defendant's patents Nos. 2,029,491 and 2,092,337, or any of the claims thereof.

Wherefore Plaintiff Prays:

1. That the defendant be required to appear and answer this Complaint.

2. For a declaratory decree declaring each of said Letters Patent Nos. 2,029,491 and 2,092,337, and each of the claims thereof, to be invalid and void in law.

3. For a declaratory decree specifically declaring claims 7, 8, 9, 11, 12, 13 and 14 of patent No. 2,029,491 and claims 5, 7, 8, 10, 13, 14, 15 and 18 of patent No. 2,092,337 to be invalid and void in law.

4. For a declaratory decree declaring that said Letters Patent Nos. 2,029,491 and 2,092,337 are not infringed by plaintiff because of the manufacture, sale or use of plaintiff's apparatus Johnston Perforator and Formation Tester manufactured, sold and used by plaintiff.

5. For a preliminary injunction enjoining the defendant, its associates, partners, attorneys, clerks, servants, agents, employees and confederates, and all in privity with them, and each of them, from threatening any of plaintiff's customers or dealers, or any present or prospective sellers, dealers or users of plaintiff's Johnston Perforator and *Formation*, with infringement litigation, or charging plaintiff or any of such customers, dealers or users, either verbally or in writing, with or notifying them of infringement of Letters Patent Nos. 2,029,491 and 2,092,337 if they should sell or offer for sale or use, or permit the use on their properties of plaintiff's Johnston Perforator and Formation Tester, [9] and pending the

determination of this suit be restrained and enjoined from commencing in this or in any other Court against any of the customers or dealers or any prospective customers or dealers of plaintiff, any suit for alleged infringement of the Letters Patent here in suit, to-wit, Nos. 2,029,491 and 2,092,337, because of the making, using or selling or offering for sale plaintiff's Johnston Perforator and Formation Tester.

6. For a permanent injunction of the same purport and tenor as the preliminary injunction herein prayed for.

7. That plaintiff have its costs and disbursements herein.

8. That plaintiff have such other, further or different relief as the Court may deem appropriate in the premises.

M. O. JOHNSTON OIL FIELD SERVICE
CORPORATION

By M. O. Johnston
President

HILL, MORGAN & FARRER
WILLIAM M. FARRER
MELLIN AND HANSCOM
OSCAR A. MELLIN

Attorneys for Plaintiff

[Verified.] [10]

[Endorsed]: Filed Apr. 10, 1946. Edmund L. Smith,
Clerk. [11]

[Title of District Court and Cause]

NOTICE OF AND MOTION FOR MORE DEFINITE
STATEMENT AND BILL OF PARTICULARS
UNDER RULE 12(e), R. C. P.

To M. O. Johnston Oil Field Service Corporation, Plaintiff; and Hill, Morgan & Farrer, William M. Farrer, Mellin and Hanscom, and Oscar A. Mellin, its attorneys:

Please Take Notice that on Monday, September 30, 1946, at the hour of ten o'clock a. m., or as soon thereafter as counsel can be heard, in the courtroom of the Honorable William C. Mathes, in the Post Office and Court House Building, Los Angeles, California, the Defendant in the above entitled action will bring on for hearing the following motion for a more definite statement and a bill of particulars, pursuant to Rule 12(e) of the Rules of Civil Procedure.

The Defendant moves the Court for an order requiring the Plaintiff to serve and file a more definite statement and a bill of particulars in compliance with the following requests. [12]

1.

Particularize with respect to the general allegations of Paragraph XIII of the complaint that the two patents specified are invalid "in that the things alleged to be described and patented in and by said patents were not inventions and did not require the, or any, exercise of the inventive faculty for their production and were not patentable" by stating:

(a) Each ground upon which Plaintiff will rely at the trial to establish that such things were not

inventions and did not require any exercise of the inventive faculty for their production.

(b) The number and date of issue of each patent, and the title and date of each publication, upon which Plaintiff will rely at the trial to establish that such things were not inventions and did not require any exercise of the inventive faculty for their production.

(c) The names and residences of each person upon whom Plaintiff will rely at the trial as having invented, or having had prior knowledge of, or having used or sold or offered for sale the things patented by said patents to establish that such things were not inventions and did not require any exercise of the inventive faculty for their production.

2.

Particularize with respect to the general allegations of Paragraph XIV of the complaint that the two patents specified "are invalid in that the things alleged to be described in and by said patents are inoperative" by stating separately with respect to each such patent each respect in which the things described and patented in and by such patents are inoperative upon which [13] Plaintiff will rely at the trial.

3.

Particularize with respect to the general allegation of Paragraph XV of the complaint that the two patents specified "are invalid in that the things purportedly patented thereby are not distinctly pointed out, described

and claimed, as required by the statutes of the United States" by stating separately with respect to each such patent:

(a) Each respect in which the things patented by such patent are not distinctly pointed out and described as required by the statutes of the United States, upon which Plaintiff will rely at the trial.

(b) Each respect in which the things patented by such patent are not distinctly claimed as required by the statutes of the United States, upon which Plaintiff will rely at the trial.

4.

Particularize with respect to the general allegation of Paragraph XVI of the complaint that the two specified patents, and particularly certain claims thereof, are invalid "in that said claims are vague, ambiguous and do not define or distinctly claim the alleged invention, as required by the statutes of the United States" by stating separately as to each of such patents and each of the claims specified in such paragraph each respect in which such claim is vague or ambiguous and does not define or distinctly claim the alleged invention as required by the statutes of the United States, upon which Plaintiff will rely at the trial. [14]

5.

Particularize with respect to the general allegation of Paragraph XVII of the complaint that the patents specified "are null, void and of no effect because of double patenting" by stating separately with respect to each of such patents the number and date of issue of each patent upon which Plaintiff will rely at the trial to establish such double patenting.

6.

Particularize with respect to the general allegation of Paragraph XVIII of the complaint that “each and every material and substantial part of the apparatus and things pretended to be patented by the said defendant’s Letters Patent Nos. 2,029,491 and 2,092,337 had been invented, known and publicly used, and had been on public sale and sold and had been known and used by various persons, firms and corporations and in various sundry places in the United States of America for more than two years prior to the date of the applications for said Letters Patent” by stating:

(a) The name of each patentee, the number of each patent, and the date of issue upon which Plaintiff will rely at the trial to establish such prior invention, knowledge, and use.

(b) The name and residence of each person upon whom Plaintiff will rely at the trial as having made such prior invention or as having such prior knowledge.

(c) The name and address of each person, firm, or corporation upon which Plaintiff will rely at the trial to establish such prior use.

(d) The name and address of each person, firm, or corporation upon which Plaintiff will rely at the trial to establish such offering for sale and sale. [15]

7.

Particularize with respect to the general allegation of Paragraph XIX of the complaint that “the person or persons named as the inventor or inventors in said Letters Patents Nos. 2,029,491 and 2,092,337 are not the first,

or any, inventor or inventors of the things disclosed in said Letters Patent" by stating:

(a) The name of each patentee, the number of each patent, and the date of issue upon which Plaintiff will rely at the trial to establish such allegation.

(b) The title and date of issue of each publication upon which Plaintiff will rely at the trial to establish such allegation.

(c) The name and residence of each person upon whom Plaintiff will rely at the trial to establish prior invention, knowledge, use, or sale in support of such allegation.

8.

Particularize with respect to the general allegation of Paragraph XX of the complaint that, by virtue of proceedings in the United States Patent Office relating to the applications for the patents specified, and by virtue of "the limitations imposed thereby during the negotiations in the United States Patent Office," the Defendant is estopped "from claiming any scope or subject matter of said alleged Letters Patent, or any of the claims thereof, as would comprehend or embrace any apparatus or devices manufactured, sold or used by this plaintiff" by stating each limitation of each claim upon which Plaintiff at the trial will rely in support of such allegation.

The foregoing particulars are necessary, because, as will be apparent from the nature of the allegations of the complaint [16] referred to, their subject matter is not averred with sufficient definiteness or particularity to

enable Defendant either to properly prepare its responsive pleading or to prepare for trial.

The Defendant attempted to secure the particulars sought by this motion by twice taking the deposition of Mr. M. O. Johnston, president of the Plaintiff company, who verified the complaint. In his first deposition, taken June 27, 1946, by consent of the Plaintiff, Mr. Johnston was asked questions substantially identical with the requests here made and declined to answer such questions on the advice of his counsel.

In the second deposition of Mr. Johnston, taken September 3, 1946, by consent of the Plaintiff, after service of a motion to compel answers, Mr. Johnston was again asked questions substantially identical with these requests but was able to provide no such particulars. Typical of Mr. Johnston's replies to such questions is the following:

"Q The next question from your former deposition:

'Paragraph 17 asserts, "That plaintiff is informed and believes and on information and belief alleges that said patents Nos. 2,029,491 and 2,092,337 are null, void, and of no effect because of double patenting."

'Please identify the patents upon which each of the patents specified in the complaint is null and void and of no effect because of double patenting.'

"A I was again advised by my attorney. I don't know about double patenting.

“Q Did he advise you of any patent upon which either of the patents in suit was invalid for double patenting, and if so tell the numbers of such patents. [17]

“A I don’t remember that he did.

“Q And you were informed with respect to this double patenting only by your attorney?

“A Yes, sir.

“Q And when you refer to your ‘attorneys,’ you mean your counsel in this present suit, I take it?

“A Yes.” (p. 120, l. 11 to p. 121, l. 4)

In support of the foregoing motion Defendant will rely upon the complaint herein, the said depositions of Mr. Johnston, and the following points and authorities.

Dated: At Los Angeles, California, this 12th day of September, 1946.

HARRIS, KIECH, FOSTER & HARRIS

By Ward D. Foster

Attorneys for Defendant [18]

Received copy of the within this 12 day of Sept. 1946. Hill, Morgan & Farrer and Mellin & Hanscom, by W. M. Farrer, Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 12, 1946. Edmund L. Smith, Clerk. [19]

[Title of District Court and Cause]

PLAINTIFF'S MORE DEFINITE STATEMENT
AND BILL OF PARTICULARS

Comes now the plaintiff in the above entitled action and in answer to defendant's demand for a more definite statement and bill of particulars under rule 12(e) R. C. P. hereby submits the following particulars: [20]

Answer to Demand 1

(a) As now advised, plaintiff will contend at the trial that the act or acts of connecting a well tester, a packer and a gun perforator together as illustrated, described, claimed and allegedly patented in and by the patents in suit did not require the, or any, exercise of the inventive faculty and was not patentable.

(b) As presently advised, plaintiff will rely at the trial upon the patents or publications set out herein in Answer to Demand 6(a) to establish that such things were not inventions and did not require the exercise of the inventive faculty for their production.

(c) As now advised, plaintiff will rely at the trial upon the patentees of the patents set out herein in Answer to Demand 6(a) as having invented, or having prior knowledge of, or having used or sold or offered for sale the things patented by said patents to establish that such things were not inventions and did not require any exercise of the inventive faculty for their production.

Answer to Demand 2

As now advised, plaintiff will contend at the trial that the devices illustrated and described in each of the patents in suit will not operate or function as described or illustrated in such patents, and that the particular respects in which such devices are inoperative are those set forth in detail in the deposition of M. O. Johnston taken by this defendant heretofore. [21]

Answer to Demand 3

(a) As now advised, plaintiff will contend at the trial that the claims of each of the patents in suit do not satisfy the requirements of R. S. 4888 of the United States, in that such claims of those patents do not in any respect particularly point out and distinctly claim the part, improvement or combination which the patentees claim as their invention or discovery.

(b) The answer to this request is the same as (a) above.

Answer to Demand 4

The answer to this request is the same as 3(a) above.

Answer to Demand 5

As now advised, plaintiff will contend at the trial that patent in suit No. 2,092,337 is invalid, null and void and of no effect because of double patenting and to establish such defense plaintiff will rely on patent No. 2,029,491.

Answer to Demand 6

(a) As now advised plaintiff will rely on the following patentees of the following numbered patents, residing at the places set forth in the said patents, and the dates of issue of said patents:

Burr et al	68,350	Sept.	3, 1867
Franklin	263,330	Aug.	29, 1882
Cooper	1,000,583	Aug.	15, 1911
Cox	1,347,534	July	27, 1920
Halliday	1,474,630	Nov.	20, 1923
Edwards	1,514,585	Nov.	4, 1924 [22]
Steele	1,602,864	Oct.	12, 1926
Miller	1,837,788	Dec.	22, 1931
Fortune	1,853,557	Apr.	12, 1932
Johnston	1,901,813	Mar.	14, 1933
Simmons	1,930,987	Oct.	17, 1933
Anderson	39,787	Sept.	8, 1863
Mims	1,582,184	Apr.	27, 1926
Greene	1,641,483	Sept.	6, 1927
Rembert	1,835,722	Dec.	8, 1931
Prikel	2,022,976	Dec.	3, 1935
Prikel	2,026,061	Dec.	31, 1935
Haines	2,029,478	Feb.	4, 1936
O'Neill	2,034,768	March	24, 1936
Spencer	2,037,938	Apr.	21, 1936
Wells	2,037,955	Apr.	21, 1936
Ridley	2,041,209	May	19, 1936
Johnston	2,048,451	July	21, 1936
Schlumberger	2,055,506	Sept.	29, 1936
Lane	2,062,974	Dec.	1, 1936

Lane	2,062,975	Dec.	1, 1936
Turechek	2,092,294	Sept.	7, 1937
Lane	2,092,317	Sept.	7, 1937
Metzner	2,142,572	Jan.	3, 1939
Yarbrough	2,142,583	Jan.	3, 1939
Mack	724,904	Apr.	7, 1903
Frederickson	1,015,432	Jan.	23, 1912
Le Bus	1,577,474	March	23, 1926
Fondren	1,615,690	Jan.	25, 1927
Wood	1,779,652	Oct.	28, 1930
Jones	1,847,613	March	1, 1932 [23]
Moss et al	1,910,851	May	23, 1933
Martois	1,941,703	Jan.	2, 1934
Crowell	Re. 16,577	Mar.	29, 1927
Neitzel	Re. 16,991	June	12, 1928
Hemme	976,737	Nov.	22, 1910
Meyer	1,018,333	Feb.	20, 1912
Mack	1,109,078	Sept.	1, 1914
Burstall	1,710,203	Apr.	23, 1929
Shepard et al	1,766,766	June	24, 1930

(b) The answer to this request is the same as (a) hereof.

(c) The answer to this request is the same as (a) hereof.

(d) The answer to this request is the same as (a) hereof.

Answer to Demand 7

(a) As now advised, plaintiff will contend at the trial that in addition to the fact that it required no invention to produce the devices of the patents in suit and, there-

fore, the alleged inventors thereof were not the first, or any, inventors thereof, that the person or persons named as the inventor or inventors in the Letters Patent in suit are not the first, or any, inventor or inventors of the things disclosed in said Letters Patent because said things had been invented by each of the patentees of the patents identified by number and date of issue set out in Answer 6(a) hereof.

(b) The title and date of issue of each of the patents set out in the list of patents in Answer 6(a) hereof.

(c) The names and residences of the patentees set forth in [24] the patents listed in Answer 6(a) hereof.

Answer to Demand 8

As now advised, plaintiff will contend at the trial that each and every of the acts of the applicants for the Letters Patent in suit in canceling claims, in amending claims, and in the submission of new and different claims during the proceedings in the United States Patent Office as set forth in the documents constituting such proceedings will be relied upon at the trial in support of the allegations in paragraph XX of the complaint.

HILL, MORGAN & FARRER
WILLIAM M. FARRER
MELLIN AND HANSCOM
OSCAR A. MELLIN

Attorneys for Plaintiff

Dated: September 27, 1946.

Received copy of the within Plaintiff's More Definite Statement and Bill of Particulars, this 27 day of September, 1946. Harris, Kiech, Foster & Harris, Ward D. Foster, Attorneys for Defendant.

[Endorsed]: Filed Sep. 27, 1946. Edmund L. Smith, Clerk. [25]

[Title of District Court and Cause]

ANSWER TO COMPLAINT AND COUNTER-
CLAIM FOR INFRINGEMENT OF UNITED
STATES LETTERS PATENT NOS. 2,029,491
AND 2,092,337

Comes now the Defendant above named and, for its answer to the Complaint heretofore filed, admits, denies, and alleges as follows:

I.

Answering Paragraph I of the Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph.

II.

Answering Paragraph II of the Complaint, Defendant admits the allegations of said paragraph. [26]

III.

Answering Paragraph III of the Complaint, Defendant admits that the Complaint is founded on the Patent Laws of the United States concerning the validity of Letters Patent of the United States and the question of their infringement by acts of the Plaintiff; Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments that the Plaintiff and the Defendant are residents of different states or the averment that the amount in controversy is in excess of Three Thousand Dollars (\$3,000.00); and Defendant admits that jurisdiction is conferred by Section 274D of the Judicial Code (Federal Declaratory Judgments Act, Title 28, Section 400 U. S. C.).

IV.

Answering Paragraph IV of the Complaint, Defendant admits that it appears from the records of the United States Patent Office that, and alleges that, on the 4th day of February, 1936, Letters Patent of the United States No. 2,029,491 were granted and issued to The Technicraft Engineering Corporation, for Gun Type Formation Tester, and, subsequent to said grant and issuance, said grantee duly assigned said Letters Patent to the Defendant, Lane-Wells Company, and said Defendant, Lane-Wells Company, since the assignment, has been, and now is, vested with the legal title to said Letters Patent No. 2,029,491 and all causes of action for infringement thereof.

V.

Answering Paragraph V of the Complaint, Defendant admits that it appears from the records of the United States Patent Office that, and alleges that, on the 7th day of September, 1937, Letters Patent of the United States No. 2,092,337 were granted and issued to The Technicraft Engineering Corp., for Formation Testing [27] Apparatus, and, subsequent to said grant and issuance, said grantee duly assigned said Letters Patent to the Defendant, Lane-Wells Company, and said Defendant, Lane-Wells Company, since the assignment, has been, and now is, vested with the legal title to said Letters Patent No. 2,092,337 and all causes of action for infringement thereof.

VI.

Answering Paragraph VI of the Complaint, Defendant admits that Plaintiff, M. O. Johnston Oil Field Service Corporation, has been, and now is, engaged in the busi-

ness of operating special tools for use in connection with formation testing and sampling in oil well bores and in gun devices for perforating the casing of oil well bores; Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that Plaintiff, M. O. Johnston Oil Field Service Corporation, has been for many years engaged in the business of operating special tools for use in connection with formation testing and sampling in oil well bores and in gun devices for perforating the casing of oil well bores or the averment that Plaintiff, M. O. Johnston Oil Field Service Corporation, has been for many years, or at all, or now is, engaged in the business of designing, manufacturing, or selling special tools for use in connection with formation testing and sampling in oil well bores and in gun devices for perforating the casing of oil well bores; Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that, prior hereto, Plaintiff, M. O. Johnston Oil Field Service Corporation, at great, or any, expense designed or developed an apparatus for perforating the casing in an oil well bore and thereafter entrapping a sample of well fluid entering the casing through the perforations so formed, which apparatus is known as the Johnston Perforator and Formation Tester, or otherwise; Defendant [28] is without knowledge or information sufficient to form a belief as to the truth of the averment that Plaintiff has heretofore spent large, or any, sums of money in producing said apparatus in commercial quantities or the averment that Plaintiff now has a substantial investment therein; and Defendant admits that Plaintiff intends to manufacture apparatus for perforating the casing in an oil well bore and thereafter entrapping

a sample of well fluid entering the casing through the perforations so formed in large and constantly increasing quantities and is now so engaged.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that Plaintiff has built a large or profitable, or any, business in the operation or use of said apparatus or valuable good will in connection therewith or the averment that such business is constantly increasing.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that Plaintiff's ability to continue to manufacture the said devices, or commercially operate, or use the same, in oil wells, is of great, or any, importance to the Plaintiff or to the oil industry.

VII.

Answering Paragraph VII of the Complaint, Defendant admits that, in the event that claims numbered 7, 8, 9, 11, 12, 13, and 14 of Letters Patent No. 2,029,491 and claims 5, 7, 9, 10, 13, 14, 15, and 18 of Letters Patent No. 2,092,337 are valid and interpreted and applied literally as worded, the same can be read upon the Johnston Perforator and Formation Tester manufactured, operated, and used by the Plaintiff and are infringed thereby.

VIII.

Answering Paragraph VIII of the Complaint, Defendant denies each and every allegation thereof. [29]

IX.

Answering Paragraph IX of the Complaint, Defendant denies that, due to its alleged holding out of the aforesaid, or any, patents to the public as being valid or of a

scope sufficient to include apparatus such as Plaintiff's Johnston Perforator and Formation Tester, any oil well operators will refuse to use Plaintiff's Johnston Perforator and Formation Tester because of a fear that an action for infringement of the aforesaid patents may be brought against them. Defendant denies that the existence of said patents or its alleged holding out thereof as of a scope and valid as aforesaid, or otherwise, has been, or will be, to constitute a restraint on the development of Plaintiff's business in the said Johnston Perforator and Formation Tester, to Plaintiff's damage, or otherwise.

X.

Answering Paragraph X of the Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of any of the averments of said paragraph.

XI.

Answering Paragraph XI of the Complaint, Defendant denies each and every averment thereof.

XII.

Answering Paragraph XII of the Complaint, Defendant admits that there is a substantial and actual controversy between Plaintiff and Defendant as to the validity and scope of United States Letters Patent Nos. 2,029,491 and 2,092,337 and as to their infringement by Plaintiff and Plaintiff's consumers and dealers in Plaintiff's aforesaid Johnston Perforator and Formation Tester and is without knowledge or information sufficient to form a belief as [30] to the truth of each and every of the other averments of said paragraph.

XIII.

Answering Paragraph XIII of the Complaint, Defendant denies each and every averment thereof.

XIV.

Answering Paragraph XIV of the Complaint, Defendant denies each and every averment thereof.

XV.

Answering Paragraph XV of the Complaint, Defendant denies each and every averment thereof.

XVI.

Answering Paragraph XVI of the Complaint, Defendant denies each and every averment thereof.

XVII.

Answering Paragraph XVII of the Complaint, Defendant denies each and every averment thereof.

XVIII.

Answering Paragraph XVIII of the Complaint, Defendant denies each and every averment thereof.

XIX.

Answering Paragraph XIX of the Complaint, Defendant denies each and every averment thereof. [31]

XX.

Answering Paragraph XX of the Complaint, Defendant denies each and every averment thereof.

XXI.

Answering Paragraph XXI of the Complaint, Defendant denies each and every averment thereof.

COUNTERCLAIM FOR INFRINGEMENT OF
UNITED STATES LETTERS PATENT NOS.
2,029,491 AND 2,092,337

Comes now the Defendant and Counterclaimant, Lane-Wells Company, and for cause of action for patent infringement alleges:

A-I.

That Counterclaimant, Lane-Wells Company, is a corporation duly organized and existing under the laws of the State of Delaware and has a place of business in the County of Los Angeles, State of California, and within the Southern District of California, Central Division.

A-II.

That, as Counterclaimant, Lane-Wells Company, is informed by the pleadings in this cause of action, and for the purpose of this counterclaim alleges, Counter-defendant, M. O. Johnston Oil Field Service Corporation, is a corporation duly organized and existing under the laws of the State of California, having its principal place of business at Los Angeles, California, within the Southern District of California, Central Division, in which place and in which District, among others, the acts hereinafter complained of have been done and are being done by said Counter-defendant. [32]

A-III.

That the jurisdiction of this Court depends upon the Patent Laws of the United States.

A-IV.

That on February 4, 1936, United States Letters Patent No. 2,029,491, for Gun Type Formation Tester, were duly and legally issued to The Technicraft Engineering Corporation, a corporation of California, having a place of business in Los Angeles, California; that on or about September 1, 1937, by an instrument in writing, duly executed, and recorded on or about November 29, 1937, in Liber A-173, page 33, in the United States Patent Office, The Technicraft Engineering Corporation assigned the entire right, title, and interest in and to said Letters Patent No. 2,029,491 and all causes of action for infringement thereof to Lane-Wells Company, Counterclaimant; and that, ever since said assignment, Lane-Wells Company, Counterclaimant, has been, and now is, the owner of said Letters Patent No. 2,029,491 and all causes of action for infringement thereof.

A-V.

That on September 7, 1937, United States Letters Patent No. 2,092,337, for Formation Testing Apparatus, were duly and legally issued to The Technicraft Engineering Corp., a corporation of California, having a place of business in Los Angeles, California; that on or about September 1, 1937, by an instrument in writing, duly executed, and recorded on or about November 29, 1937, in Liber A-173, page 33, in the United States Patent Office, The Technicraft Engineering Corp. assigned the entire right, title, and interest in and to said Letters Patent No.

2,092,337 and all causes of action for infringement thereof to Lane-Wells Company, Counterclaimant; and that, ever since said assignment, Lane-Wells [33] Company, Counterclaimant, has been, and now is, the owner of said Letters Patent No. 2,092,337 and all causes of action for infringement thereof.

A-VI.

M. O. Johnston Oil Field Service Corporation, Counter-defendant, has been, and now is, infringing said United States Letters Patent Nos. 2,029,491 and 2,092,337, and each of them, by making and using and, as Counterclaimant is informed by the pleadings in this case and for the purpose of this counterclaim, on information and belief alleges, by selling devices embodying the patented inventions, and each of them, and will continue to do so unless enjoined by this Court.

A-VII.

That the infringing acts of the Counter-defendant have been performed with full knowledge by, and complete notice to, Counter-defendant of said Letters Patent Nos. 2,029,491 and 2,092,337, and each of them, and that the acts of Counter-defendant herein complained of constitute wilful, wanton, intentional, and deliberate infringement of said Letters Patent, and each of them.

Wherefore, Defendant-Counterclaimant Prays:

(1) For a preliminary and final injunction against further infringement by Plaintiff-Counter-defendant and those controlled by it;

(2) For a judgment dismissing the Complaint herein;

(3) For a judgment directing an accounting of profits of Plaintiff-Counter-defendant and damages of Defendant-Counterclaimant, and that such damages be trebled in view of the wilful, wanton, intentional, and deliberate nature of the infringement; and [34]

(4) For a judgment that Defendant-Counterclaimant have its costs in this action sustained, and such other and further relief as to the Court may seem just.

Dated: At Los Angeles, California, this 16th day of October, 1946.

HARRIS, KIECH, FOSTER & HARRIS

By Ward D. Foster

Attorneys for Defendant-Counterclaimant [35]

Received copy of the within Answer this 16 day of Oct., 1946. Hill, Morgan & Farrer, Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 16, 1946. Edmund L. Smith, Clerk. [36]

[Title of District Court and Cause]

ANSWER TO COUNTERCLAIM

Comes now the plaintiff and in answer to the counterclaim filed by the defendant-counterclaimant herein admits, denies and alleges as follows:

I.

In answer to Paragraph A-I of the counterclaim, plaintiff admits the allegations thereof. [37]

II.

In answer to Paragraph A-II of the counterclaim, plaintiff-counter-defendant admits the allegations thereof.

III.

In answer to Paragraph A-III of the counterclaim, plaintiff-counter-defendant admits the allegations thereof.

IV.

In answer to Paragraph A-IV of the counterclaim, plaintiff-counter-defendant admits that on February 4, 1936, United States Letters Patent No. 2,029,491 were issued by the United States Patent Office to The Technicraft Engineering Corporation, and that by virtue of assignment Lane-Wells Company, counterclaimant, has been and now is the owner of said Letters Patent No. 2,029,491. Except those matters specifically admitted herein, the plaintiff-counter-defendant, both generally and specifically, denies each and every allegation in said Paragraph A-IV contained.

V.

In answer to Paragraph A-V of the counterclaim, plaintiff-counter-defendant admits that on September 7, 1937, United States Letters Patent No. 2,092,337 were

issued by the United States Patent Office to The Techni-craft Engineering Corporation, and that by virtue of assignment Lane-Wells Company, counterclaimant, has been and now is the owner of said Letters Patent No. 2,092,337. Except those matters specifically admitted herein, the plaintiff-counter-defendant, both generally and specifically, denies each and every allegation in said Paragraph [38] A-V contained.

VI.

In answer to Paragraph A-VI of the counterclaim, plaintiff-counter-defendant, both specifically and generally, denies each and every allegation therein contained.

VII.

In answer to Paragraph A-VII of the counterclaim, plaintiff-counter-defendant admits that any acts which it has committed and done has been with the full knowledge of the existence of Letters Patent Nos. 2,029,491 and 2,092,337 and each of them, but denies that any acts done by plaintiff-counter-defendant constitute wilful, wanton, intentional and deliberate, or any, infringement of said Letters Patent, or either of them.

VIII.

Further answering the counterclaim, plaintiff-counter-defendant is informed and believes and on information and belief alleges that said patents Nos. 2,029,491 and 2,092,337 are invalid in that the things alleged to be described and patented in and by said patents were not inventions and did not require the, or any, exercise of the inventive faculty for their production and were not patentable, and that, therefore, said alleged patents Nos. 2,029,491 and 2,092,337 are null and void and of no effect.

IX.

Further answering the counterclaim, plaintiff-counter-defendant is informed and believes and on information and belief alleges that said patents Nos. 2,029,491 and 2,092,337 are invalid [39] in that the things alleged to be described and patented in and by said patents are inoperative.

X.

Further answering the counterclaim, plaintiff-counter-defendant is informed and believes and on information and belief alleges that the Letters Patent referred to in said counterclaim are invalid and should not have been granted because the combinations of parts therein claimed are incapable of performing any useful function and are inoperative to perform any useful function and therefore lack utility.

XI.

Further answering the counterclaim, plaintiff-counter-defendant is informed and believes and on information and belief alleges that said patents Nos. 2,029,491 and 2,092,337 are invalid in that the things purportedly patented thereby are not distinctly pointed out, described and claimed, as required by the statutes of the United States.

XII.

Further answering the counterclaim, plaintiff-counter-defendant is informed and believes and on information and belief alleges that said patents Nos. 2,029,491 and 2,092,337 are invalid, particularly as to claims 7, 8, 9, 11,

12, 13 and 14 of patent No. 2,029,491 and claims 5, 7, 9, 10, 13, 14, 15 and 18 of patent No. 2,092,337, in that said claims are vague, ambiguous and do not define or distinctly claim the alleged invention, as required by the statutes of the United States. [40]

XIII.

Further answering the counterclaim, plaintiff-counter-defendant is informed and believes and on information and belief alleges that said patent No. 2,092,337 is null, void and of no effect because of double patenting.

XIV.

Further answering the counterclaim, plaintiff-counter-defendant is informed and believes and on information and belief alleges that Letters Patent No. 2,092,337 are and each of the claims thereof is void and of no force and effect because the alleged invention and improvement claimed therein, and each and every substantial part thereof was, long prior to any invention or discovery thereof by the patentee named in said patent, patented or described in Letters Patent of the United States No. 2,029,491.

XV.

Further answering the counterclaim, plaintiff-counter-defendant is informed and believes and on information and belief alleges that each of the patents in suit and each of the claims thereof is void and of no force and effect because the alleged invention and improvement claimed therein and covered thereby, and each and every substantial part thereof was, long prior to any invention or discovery thereof by the patentees named in said patents, patented or described in the following patents and printed publications: [41]

Burr et al	68,350	Sept. 3, 1867
Franklin	263,330	Aug. 29, 1882
Cooper	1,000,583	Aug. 15, 1911
Cox	1,347,534	July 27, 1920
Halliday	1,474,630	Nov. 20, 1923
Edwards	1,514,585	Nov. 4, 1924
Steele	1,602,864	Oct. 12, 1926
Miller	1,837,788	Dec. 22, 1931
Fortune	1,853,557	Apr. 12, 1932
Johnston	1,901,813	Mar. 14, 1933
Simmons	1,930,987	Oct. 17, 1933
Anderson	39,787	Sept. 8, 1863
Mims	1,582,184	Apr. 27, 1926
Greene	1,641,483	Sept. 6, 1927
Rembert	1,835,722	Dec. 8, 1931
Prikel	2,022,976	Dec. 3, 1935
Prikel	2,026,061	Dec. 31, 1935
Haines	2,029,478	Feb. 4, 1936
O'Neill	2,034,768	Mar. 24, 1936
Spencer	2,037,938	Apr. 21, 1936
Wells	2,037,955	Apr. 21, 1936
Ridley	2,041,209	May 19, 1936
Johnston	2,048,451	July 21, 1936
Schlumberger	2,055,506	Sept. 29, 1936
Lane	2,062,974	Dec. 1, 1936
Lane	2,062,975	Dec. 1, 1936
Turechek	2,092,294	Sept. 7, 1937
Lane	2,092,317	Sept. 7, 1937
Metzner	2,142,572	Jan. 3, 1939
Yarbrough	2,142,583	Jan. 3, 1939 [42]

Mack	724,904	Apr. 7, 1903
Frederickson	1,015,432	Jan. 23, 1912
Le Bus	1,577,474	Mar. 23, 1926
Fondren	1,615,690	Jan. 25, 1927
Wood	1,779,652	Oct. 28, 1930
Jones	1,847,613	Mar. 1, 1932
Moss et al	1,910,851	May 23, 1933
Martois	1,941,703	Jan. 2, 1934
Crowell	Re. 16,577	Mar. 29, 1927
Neitzel	Re. 16,991	June 12, 1928
Hemme	976,737	Nov. 22, 1910
Meyer	1,018,333	Feb. 20, 1912
Mack	1,109,078	Sept. 1, 1914
Burstall	1,710,203	Apr. 23, 1929
Shepard et al	1,766,766	June 24, 1930

XVI.

Further answering the counterclaim, plaintiff-counter-defendant is informed and believes and on information and belief alleges that the person or persons named as the inventor or inventors in said Letters Patent Nos. 2,029,491 and 2,092,337 are not the first, or any, inventor or inventors of the things disclosed in said Letters Patent and that, therefore, said Letters Patent are invalid.

XVII.

Further answering the counterclaim, plaintiff-counter-defendant is informed and believes and on information and belief alleges that the defendant is estopped by the proceedings in the United States Patent Office in the matter of the applications [43] of the applicants for said Letters Patent Nos. 2,029,491 and 2,092,337, and the acquiescence of said applicants in and to the rulings and

rejections of the Commissioner of Patents in the negotiations for said Letters Patent, and in and by the limitations imposed thereby during the negotiations in the United States Patent Office leading up to the grant and issuance of said Letters Patent, from claiming any scope or subject matter of said alleged Letters Patent, or any of the claims thereof, as would comprehend or embrace any apparatus or devices manufactured, sold or used by this plaintiff-counter-defendant.

XVIII.

Further answering the counterclaim, plaintiff-counter-defendant is informed and believes and, therefore, on information and belief alleges that its said Johnston Perforator and Formation Tester, aforesaid, or any of the uses thereof, do not infringe the defendant-counterclaimant's patents Nos. 2,029,491 and 2,092,337, or any of the claims thereof.

Wherefore plaintiff-counter-defendant prays:

1. For a judgment dismissing the counterclaim with costs to the plaintiff-counter-defendant.
2. For such other and further relief as to the Court may seem just.

Dated: November 4, 1946.

HILL, MORGAN & FARRER
WILLIAM M. FARRER
MELLIN AND HANSCOM
OSCAR A. MELLIN

Attorneys for Plaintiff-Counter-Defendant [44]

Received copy of the within Answer this 4th day of November, 1946. Harris, Kiech, Foster & Harris, Ward D. Foster, Attorneys for Defendant.

[Endorsed]: Filed Nov. 4, 1946. Edmund L. Smith, Clerk. [45]

[Title of District Court and Cause]

PRE-TRIAL STIPULATION

Pursuant to the Order for Pre-trial Hearing entered by this Court October 31, 1946, the principal counsel for the parties hereto have conferred, exhibited to each other the documents, and formulated a statement of the facts involved, as required by such order, and present herewith a statement of the facts involved, as claimed by each party, showing what facts will be admitted for the purposes of the suit. [46]

STATEMENT OF THE FACTS INVOLVED AS CLAIMED BY PLAINTIFF

A-1. Plaintiff, M. O. Johnston Oil Field Service Corporation, is a California corporation having its principal place of business in Los Angeles, California; Defendant, Lane-Wells Company, is a Delaware corporation having a place of business in the County of Los Angeles, California; and the Court has jurisdiction over both parties.

Admitted by Defendant.

A-2. An actual controversy exists between the parties with respect to the validity and infringement of United States Letters Patent Nos. 2,029,491 and 2,092,337; and this Court has jurisdiction thereof under the patent laws of the United States and under Section 274-D of the Judicial Code, 28 U. S. C. 400.

Admitted by Defendant.

A-3. United States Letters Patent No. 2,029,491, for Gun Type Formation Tester, was issued February 4, 1936, on the application of Wilfred G. Lane, and United States Letters Patent No. 2,092,337, for Formation Testing

Apparatus, was issued September 7, 1937, on the application of Lloyd Spencer, and that the Defendant, Lane-Wells Company, has been, since September 1, 1937, and now is, the owner of the entire right, title and interest in and to said Letters Patent and all causes of action for infringement thereof.

Admitted by Defendant.

A-4. That prior to the filing of the Complaint and Counterclaim herein, and within six (6) years immediately preceding the filing of the Complaint and Counterclaim herein, and within the [47] Southern District of California, Central Division, the Plaintiff has manufactured and used a formation tester and a gun perforator assembled on a single string of tubing.

A-5. That formation testers such as assembled by Plaintiff on a single string of tubing with a gun perforator were old and well known and in public use prior to December 1932.

Not admitted by Defendant.

A-6. That gun perforators (both electrically and mechanically operated) for perforating well casing were old and well known and in public use, described and illustrated in United States and foreign patents and in printed publications in the United States prior to December 1932.

Not admitted by Defendant.

A-7. That in the Plaintiff's apparatus, when the formation tester and the gun perforator are assembled on a single string of tubing, the formation tester separately performs only its old and well-known function and the

perforator gun performs separately only its old and well-known function.

Not admitted by Defendant.

A-8. That when assembled on a single string of tubing, as done by Plaintiff, the formation tester and the gun perforator perform or produce no new or different function or operation than that theretofore separately performed or produced by them.

Not admitted by Defendant. [48]

A-9. When Plaintiff's formation tester and perforating gun are assembled on a single string of tubing, they each separately perform its single function in the same old way and no new function or result flows from assembling the two devices on a single string of tubing.

Not admitted by Defendant.

A-10. That Plaintiff's assembly of a formation tester and perforating gun on a single string of tubing constitutes no more than an aggregation of elements old in the art, which in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them.

Not admitted by Defendant.

A-11. That in Plaintiff's assembly of a formation tester and a perforator gun on a single string of tubing, the perforator gun operates completely independently of the formation tester and the formation tester operates completely independently of the gun perforator, and the result

accomplished by the assembly is not the production of the combination but a mere aggregation of several results each the complete product of one of the assembled elements.

Not admitted by Defendant.

A-12. That no more than mechanical skill would be required to assemble the formation testers shown in the prior art prior to December 1932, and the gun perforators shown in the prior art prior to December 1932, on a single string of tubing.

Not admitted by Defendant. [49]

A-13. That the apparatus shown in the two Letters Patent in suit are of no practical value to the industry.

Not admitted by Defendant.

A-14. That the apparatus shown in the patent in suit No. 2,029,491 is inoperative to produce the results claimed for in said patent, and is of no practical value to the industry.

Not admitted by Defendant.

A-15. That the apparatus shown in the patent in suit No. 2,092,337 is inoperative to produce the results claimed for in said patent, and is of no practical value to the industry.

Not admitted by Defendant.

A-16. That no devices constructed according to either of the patents in suit have gone into actual use.

Not admitted by Defendant.

A-17. That the assembly of a formation tester and perforating gun by Plaintiff is different in construction and mode of operation from the devices disclosed in the patents in suit.

Not admitted by Defendant.

A-18. That in Plaintiff's assembly of a formation tester and perforating gun the different parts thereof operate to produce results in a substantially different manner than the parts operate in the devices of the patents in suit to produce the result claimed for them in such patents.

Not admitted by Defendant. [50]

A-19. That the claims of the patents in suit define the apparatus therein solely by their function and not by their physical characteristics.

Not admitted by Defendant.

A-20. That no more than ordinary skill is required to combine a formation tester old in the art and a perforating gun.

Not admitted by Defendant.

A-21. That the patents in suit are invalid for the reasons set out in the Complaint and Answer to Counterclaim.

Not admitted by Defendant.

A-22. That the assembly of a formation tester and perforating gun as manufactured and used by Plaintiff does not infringe any of the claims of the patents in suit.

Not admitted by Defendant. [51]

STATEMENT OF THE FACTS INVOLVED
AS CLAIMED BY DEFENDANT

B-1. Same as A-1.

Admitted by Plaintiff.

B-2. Same as A-2.

Admitted by Plaintiff.

B-3. Same as A-3.

Admitted by Plaintiff.

B-4. Same as A-4.

Admitted by Plaintiff.

B-5. United States Letters Patent No. 2,029,491, and particularly claims 7, 8, 9, 11, 12, 13, and 14 thereof, are valid and infringed by the manufacture and use of the combined formation tester and gun perforator by Plaintiff; United States Letters Patent No. 2,092,337, and particularly claims 5, 7, 9, 10, 13, 14, 15, and 18 thereof, are valid and infringed by the manufacture and use of the combined formation tester and gun perforator by Plaintiff.

Not admitted by Plaintiff.

Contended by Defendant.

ISSUES IN CONTROVERSY

(1) The validity of the Letters Patent in suit;

(2) Whether or not the Plaintiff's assembly of a formation tester and a perforating gun constitutes an infringement of any of the claims of the patents in suit. [52]

LIST OF ALL DOCUMENTS EXHIBITED BY
THE PARTIES

At the pre-trial conference of the counsel of the parties there were exhibited the following documents by the Plaintiff:

A-1. Prior patents pleaded in Answer to Counter-claim, and in addition the following patents and printed publications:

Wells	1,926,017	Sept. 5, 1933
Wells	1,987,919	Jan. 15, 1935
Lane	2,029,490	Feb. 4, 1936
Johnston	1,709,940	Apr. 23, 1929
Johnston	1,842,270	Jan. 19, 1932
Collins	2,295,634	Sept. 15, 1942
Collins	2,307,360	Jan. 5, 1943

Foreign Patents

Charles Delamare-Maze (Netherlands) OCTR001
No. 262,78 Feb. 27, 1928.

Prior Printed Publications

Pages 44 and 45, Volume 58, No. 11, of "The Oil Weekly" of August 29, 1930.

The article appearing on page 53 entitled "Formation Testers" in the book "Petroleum Development and Technology" of the American Institute of Mining and Metallurgical Engineers, Vol. 107, Copyrighted 1934 by the American Institute of Mining and Metallurgical Engineers.

An article "Short Gun Shoots Holes in Well Casing" appearing on page 67 of "Engineering News-Record, issue of July 10, 1930.

Deposition of Walter T. Wells heretofore taken.

A drawing of a well tester and perforator gun assembled on a string of tubing as heretofore manufactured and used by Plaintiff.

It is stipulated that printed or photostatic copies may be offered in evidence in lieu of originals. [53]

A-2. File wrappers and contents of the two patents in suit.

By the Defendant:

B-1: Patents in suit.

It is stipulated that printed copies may be offered in evidence in lieu of originals.

B-2. Executed Assignment of the patents in suit from the Technicraft Engineering Corp. to Lane-Wells Company, dated September 1, 1937, and causes of action for infringement.

Due execution and recording of Assignment admitted by Plaintiff, so that Assignment need not be offered in evidence.

B-3. Drawing and description of combined formation tester and gun perforator made and used by Plaintiff within this District and Division and within six (6) years preceding the filing of the Complaint and since September 1, 1937.

This drawing and description were incomplete; are to be completed as soon as possible and submitted to Plaintiff's counsel for approval.

B-4. Deposition of Mr. Johnston hereofore taken.

MISCELLANEOUS MATTERS

Counsel for the parties hereto agree that reference of all or any of the issues involved in this case to a Special Master is not advisable.

The parties hereto stipulate that each party shall have [54] only one patent expert witness to testify on direct examination on the subject matter of prior patents and publications.

ESTIMATE OF TIME FOR TRIAL

Plaintiff's counsel estimates that Plaintiff's case will require about three (3) to four (4) Court days, allowing for cross-examination of witnesses.

Defendant's counsel estimates that Defendant's case will require about two (2) to three (3) days, allowing for cross-examination of witnesses.

Dated: This 13th day of December, 1946.

HILL, MORGAN & FARRER
MELLIN & HANSCOM

By Oscar A. Mellin

Attorneys for Plaintiff.

HARRIS, KIECH, FOSTER
& HARRIS

By Ward D. Foster

Attorneys for Defendant.

[Endorsed]: Filed, Dec. 13, 1946. Edmund L. Smith,
Clerk. [55]

[Title of District Court and Cause]

PLAINTIFF'S INTERROGATORIES

Now comes the plaintiff in the above entitled cause, pursuant to Rule 33 of the Federal Rules of Civil Procedure, and propounds the following interrogatories to be answered under oath by an officer of the corporate defendant having knowledge of the facts.

* * * * *

Interrogatory No. 21

Filed herewith and labeled Exhibit "A" to Plaintiff's Interrogatories is a complete and accurate written description of the construction and operation of the plaintiff's formation tester, pressure recorder and gun perforator mounted on a single string of tubing which plaintiff refers to in its complaint and which is charged to infringe by defendant; in that connection—

(a) specifically set forth the precise claim or claims of patent No. 2,029,491 which defendant will contend at the trial to be infringed by plaintiff;

(b) specifically set forth the precise claim or claims of patent No. 2,092,337 which defendant will contend at the trial to be infringed by plaintiff.

Dated: This 13th day of February, 1947.

HILL, MORGAN & FARRER
MELLIN AND HANSCOM

By William M. Farrer
Attorneys for Plaintiff

[Endorsed]: Filed Feb. 13, 1947. Edmund L. Smith,
Clerk.

[Title of District Court and Cause]

DEFENDANT'S ANSWERS TO PLAINTIFF'S
INTERROGATORIES NOS. 5 TO 12, 17, AND
19 TO 21

State of California,
County of Los Angeles—ss.

Norman L. Dorn states that he is Vice-President of Lane-Wells Company, Defendant in the above entitled action and is competent to testify in its behalf and answers *Defendant's* Interrogatories Nos. 5 to 12, 17, and 19 to 21 on information and belief as follows: [56]

* * * * *

21(a) Claims 7, 8, 9, 11, 12, 13, and 14 of Letters Patent No. 2,029,491.

21(b) Claims 5, 7, 9, 10, 13, 14, 15, and 18 of Letters Patent No. 2,092,337.

NORMAN L. DORN
Vice Pres.

Subscribed and sworn to before me, this 10th day of March, 1947.

(Seal) PAULINE R. KOTLAN
Notary Public in and for the Above County and State.
My Commission Expires March 13, 1950.

Received copy of the within this 10 day of March, 1947. Mellin & Hanscom and Hill, Morgan & Farrer, by W. M. Farrer, Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 10, 1947. Edmund L. Smith, Clerk. [57]

[Minutes: Tuesday, January 20, 1948.]

Present: The Honorable Wm. C. Mathes, District Judge.

For further argument; Messrs. Hill, Morgan and Farrer by Attorney Farrer and Oscar Mellin, Esq., appearing as counsel for plaintiff; Ward Foster, Esq., appearing as counsel for defendant; supplemental citation of *authorized* by defendant is filed.

Attorney Foster resumes argument and concludes at 11:40 A. M.

Court recesses. Court reconvenes herein and all being present as before, the Court commends counsel for their manner of presentation.

Court finds that Lane combination patent embodies the invention and is valid and not infringed by the Johnston Service.

As to the Spencer patent, the contribution rises to no greater dignity than aggregation of old elements.

Findings and Judgment are ordered for plaintiff, and counsel for plaintiff are directed to present findings and judgment in ten days. [58]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 52 Federal Rules of Civil Procedure and rule 7 of the local rules of the District Court of the United States for the Southern District of California, the court makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

1.

The plaintiff, M. O. Johnston Oil Field Service Corporation, is a corporation duly organized and existing under the laws of the State of California, and has its principal place of business at Los Angeles, California.

2.

The defendant, Lane-Wells Company, is a [59] corporation duly organized and existing under the laws of the State of Delaware, having a place of business in the county of Los Angeles, State of California, and has designated an agent in the city of Los Angeles, county of Los Angeles, State of California, for service of process in conformity with the laws of the State of California.

3.

Technicraft Engineering Corporation was a wholly owned subsidiary of defendant.

4.

The Lane patent in suit No. 2,029,491 was issued to Technicraft Engineering Corporation, and subsequent to the grant and issuance of said patent and prior to the

filing of the complaint herein, said patent was assigned to the defendant, Lane-Wells Company, and ever since such assignment the legal title of said patent has been vested in defendant.

5.

At all times since the issuance of said patent No. 2,029,491 the legal title thereto has been vested in defendant or its wholly owned subsidiary Technicraft Engineering Corporation.

6.

The Spencer patent in suit No. 2,092,337 was issued to Technicraft Engineering Corporation, and subsequent to the grant and issuance of said patent and prior to the filing of the complaint herein, said patent was assigned to the defendant, Lane-Wells Company, and ever since its assignment the legal title of said patent has been vested in defendant.

7.

At all times since the issuance of Spencer patent [60] No. 2,092,337 the legal title thereto has been vested in defendant or its wholly owned subsidiary Technicraft Engineering Corporation.

8.

At the time of filing the complaint herein, a substantial and actual controversy existed between plaintiff and defendant as to the validity of the two patents in suit, Lane No. 2,029,491 and Spencer No. 2,092,337, and as to the question of the infringement of said two patents in suit by acts of the plaintiff.

9.

In 1932, at the time of filing of the original application for the Lane patent in suit, the art of gun perforating well casing was in its infancy and had not been commercialized.

10.

At the filing of the original application for the Lane patent in suit, the commercial use of formation testers was still in the pioneering stage.

11.

At the filing of the original application for the Lane patent in suit, there was no recognized unfilled need or want for a combined formation tester and gun perforator.

12.

At the filing of the original application for the Lane patent in suit, less satisfactory expedients had not long been used to accomplish the perforating of well casing and the obtaining a test sample from formation.

13.

At the filing of the original application for the Lane patent in suit, there was no combined formation tester and perforator gun and there had been no prior [61] unsuccessful attempts to produce one.

14.

Formation testers or sample receivers having packers to divide the well bore into upper and lower zones and adapted to receive and entrap a sample of well fluid admitted into the lower zone from the formation were old and well known prior to the making of the alleged invention of the Lane patent in suit.

15.

Long prior to the alleged invention of the Lane patent in suit, many forms of packers for dividing a well bore, cased or uncased, into an upper or lower zone were old and well known.

16.

Well casing perforating guns to be lowered into a well bore to be discharged to propel a projectile through the well casing into the surrounding formation were old and well known prior to the making of the alleged invention of the Lane patent in suit.

17.

At the time of the invention disclosed in Lane patent No. 2,029,491, defendant had control of the dominating patent covering gun perforating devices for well casing, namely, Mims patent No. 1,582,184, Exhibit 17-G.

18.

The circumstance which gave rise to the alleged invention of the combined gun type formation tester shown in the Lane patent in suit was that after the inventor had demonstrated to oil men that electrical control at the top of the well bore for firing the gun perforator was safe and feasible, defendant desired to cover by means of patents every possible application that the perforating gun might [62] have and every means by which it might be operated.

19.

A combined formation tester and perforating gun never was used commercially until 1943 when plaintiff commenced commercial use of the accused apparatus.

20.

Formation testers and perforating guns are still used separately to perforate a well casing and test through such perforations.

21.

From 1932 to the present, the major part of the business of defendant patent owner was and now is the building of perforating guns for perforating well casing and operating a perforating gun service for perforating well casings in place in oil wells.

22.

There never has been a gun-type formation tester constructed in substantial accordance with the drawings and specifications, or having substantially the mode of operation, of the Lane patent in suit No. 2,029,491.

23.

There never has been a gun-type formation tester constructed in substantial accordance with the drawings and specifications, or having substantially the mode of operation, of the Spencer patent in suit No. 2,092,337.

24.

To one skilled in the art, the terms "formation tester" or "formation testing tool" mean a tool which can be lowered into a well bore and entrap a sample, which sample is recovered by elevating it from the well bore entrapped in said tool. [63]

25.

The average depth in a well bore of making a test, either water shut-off or production test, in the California fields wherein the accused device is operated, is approximately 4500 feet.

26.

The average height of a sample recovered in a tester is approximately 500 feet.

27.

At the time a formation or water shut-off test is to be made in the well bore, the well bore and its casing are customarily maintained full of mud fluid of a specific gravity heavier than formation fluid to its upper end, in order to safeguard against a blowout and loss of the well.

28.

A formation or water shut-off test is usually made at a point relatively close to the bottom of the oil well bore.

29.

The depth of penetration of bullets from commercial gun perforators in well casing in a loose unconsolidated sand is in the range from a minimum of just outside the casing to a depth of eighteen inches.

30.

The depth of penetration of bullets from commercial gun perforators in well casing in hard sandstone would be from zero penetration to a maximum of six inches.

31.

When the well is maintained substantially full of mud fluid, the device as disclosed in the Lane patent in suit is incapable of preventing the flow of the mud fluid [64] under high velocity from the well bore into the lower end of the device, following the same path as the sample into the device and its tubing and mixing with the sample immediately after the packer of the device is released, and such mud fluid will continue to flow into the tester into

the same chamber as the sample until the level of the fluid in the tester and its tubing equalizes with the level of the mud fluid in the well bore; however, a satisfactory sample could possibly be secured by adding a liquid cushion above the sample in the Lane apparatus before the packer is released and by employing a bean at the surface of the ground, thus controlling the rate of inflow of the mud to the apparatus after the packer is unseated.

32.

In the Lane patented device the ball valve 28 will not function to prevent mud fluid from entering the tester when the packer is unseated in normal use of a tester in the oil fields, as described above in findings Nos. 25-30.

33.

Under normal conditions, as described above in findings Nos. 25-30, the amount of mud fluid which will enter the Lane device and its tubing after releasing the packer will be many times the amount of the sample taken into the device and its tubing from the formation.

34.

Under normal and usual circumstances as described above in findings Nos. 25-30, the device of the Lane patent in suit, as disclosed therein, would be impractical in industry to recover and bring to the surface of the well a beneficial test sample, without the additional use of other auxiliary equipment or devices and operations [65] not described or illustrated in the patent, and by a mode of operation not described or illustrated in the patent.

35.

The Lane patent in suit fails to disclose a device which is of any practical benefit to the oil industry, unless addi-

tional auxiliary devices or equipment not described or illustrated in the patent are used in connection therewith, to remove the sample from the device and elevate the sample to the surface of the well.

36.

The only operation which the device described and illustrated in the Lane patent has by itself, and with the mode of operation as set forth in that patent, would be the ability to be lowered into a well bore, set the packer to divide the well bore into an upper and lower zone, fire a perforating bullet through the well casing, and permit a sample to enter the tester; and such patent does not describe or illustrate any means or method for removing the sample from the tester to the surface of the well when making a test under normal and usual conditions, as described above in findings Nos. 25-30.

37.

If the Lane device were employed to make a test and separate instrumentalities, such as bailers, were required to remove the test sample from the device so that the sample may be brought to the surface, as much time would be required, under the conditions described above in findings Nos. 25-30, to make the test and recover such sample as would be required by the use of a separate perforating gun and formation tester.

38.

Subjecting a candidate-oil-producing zone through [66] perforations in a well casing to the pressure of the mud fluid in the well casing, for a matter of hours between perforating the casing and taking a formation test, would have some effect in retarding the flow of oil or native

formation fluid from such zone into the tester, because of the penetration of filtrate water into the zone and the forming of mud cake in the perforations during the time interval between perforating and testing.

39.

A candidate-oil-producing zone is subjected to the pressure of the drilling mud from one to three hundred hours during drilling through the candidate zone; and throughout that period filtrate water from the drilling mud penetrates said zone and mud cake is formed over the exposed area thereof.

40.

When perforating and testing by separately running a formation tester and a perforating gun, the time interval between perforating and testing is a matter of several hours.

41.

By connecting the Johnston Formation Tester and the Johnston Perforating Gun together to make the accused apparatus and running it into the well bore, the time interval between perforating and testing is usually a matter of from four (4) to fifteen (15) minutes.

42.

Upon making a production test of an oil sand in which the formation pressure is extremely low and far below normal formation pressure, the taking of a test immediately following perforation would result in obtaining a formation sample such as could not be obtained where a test is [67] made in a matter of several hours after perforation.

43.

In perforating a well casing and making a production test, by separately running a formation tester and a perforating gun, the time elapsed between perforating and testing will permit an additional small amount of filtrate water to penetrate into the oil sands immediately surrounding the perforations.

44.

In running a perforator gun and a tester separately, where a sample of the formation fluid is obtained in the tester, the amount of filtrate water in the test sample would be from approximately one to five per cent more than would be obtained by running the tester and perforating gun together.

45.

When a sample of the native formation fluid is obtained in the tester, an increase of one to five per cent in the amount of filtrate water taken into the tester with said sample would not normally have any disadvantageous effect as far as the efficiency of the test is concerned, in determining the nature and characteristics of the native formation fluid.

46.

Formation testers and perforating guns are separately operated for the purpose of perforating well casing and testing candidate formations more frequently than a combined formation tester and perforating gun.

47.

Claims 7-9 inclusive, and 11-14 inclusive, of the Lane patent in suit disclose a combination that is new. [68]

48.

Claims 7-9 inclusive, and 11-14 inclusive, of the Lane patent in suit disclose a combination that is useful.

49.

It is doubtful whether the claimed invention of the Lane patent involves more than a mere aggregation of old elements which produce a result not different in kind from that produced by using a formation tester and perforating gun separately.

50.

It is doubtful whether in effecting the combination of the perforator and tester as disclosed in the Lane patent in suit more than the ingenuity involved in the work of a mechanic skilled in the art was called into play.

51.

The apparatus disclosed in the Spencer patent in suit represents nothing more than a normal development of an old art and does not involve invention.

52.

The contribution of the alleged inventor of the apparatus disclosed in the Spencer patent in suit rises to no greater dignity than bringing together of a mere aggregation of old elements and did not amount to invention.

53.

The apparatus disclosed in the Spencer patent in suit required no more than the work of a mechanic skilled in the art to produce and did not involve invention.

54.

Plaintiff, *M. O. Johnston Oil Field Service Corporation*, and its predecessor in interest were pioneers in the

business of designing and manufacturing formation [69] testers for testing and sampling in deep oil well bores, and at great expense designed and developed the Johnston Formation Tester, exemplified by defendant's Exhibits AH-1, AH-2, and AH-3.

55.

The Johnston Formation Tester, designed and developed by plaintiff, and which forms a part of the accused apparatus, conforms precisely to the disclosure in the Johnston patent No. 2,073,107, plaintiff's Exhibit 17-U in evidence.

56.

Plaintiff, at great expense, developed the Johnston Perforating Gun which forms a part of the accused apparatus, and said Johnston Perforating Gun conforms substantially in construction and mode of operation to that disclosed in Collins patents Nos. 2,295,634, 2,305,139 and 2,307,360, in evidence as plaintiff's Exhibits 11, 11-A, 11-B and 11-C; and plaintiff pays royalties on the Johnston Perforator Gun to the owner of said Collins patents.

57.

The accused apparatus is an instrumentality made up of a standard Johnston Formation Tester and a standard Johnston Perforator Gun screwed to the lower end of the Johnston Formation Tester.

58.

It required only mechanical skill to perform the act of connecting the Johnston Formation Tester to the Johnston Perforating Gun to produce the accused apparatus.

59.

The Johnston Formation Tester, which forms a part of the accused apparatus, was widely and successfully used from 1932 to the present time and now is widely and [70] successfully used for the purpose of obtaining samples of formation fluid in well bores separate from the accused apparatus.

60.

The predecessor in interest of plaintiff corporation commercially operated formation testers conforming substantially in construction and mode of operation to those disclosed in Letters Patent No. 1,901,813, plaintiff's Exhibit 17-Q, from the year 1930 to the year 1932.

61.

During the latter part of 1932, the formation tester commercialized by said M. O. Johnston Oil Field Service Corporation, or its predecessor in interest, was changed to conform precisely to the Johnston Formation Tester disclosed in the Johnston patent No. 2,073,107, plaintiff's Exhibit 17-U; and the Formation Tester forming a part of the accused apparatus conforms precisely in construction and mode of operation to that disclosed in the said Johnston patent No. 2,073,107, plaintiff's Exhibit 17-U.

62.

The Johnston Formation Tester will, upon being lowered into a well bore with the well bore substantially full of mud fluid, extract a sample from the formation either from open formation or through perforations in well casing, entrap the sample and permit recovery of the sample at the mouth of the well, by removal of the tool from the well uncontaminated by any entrance of mud

fluid into the tester from the well bore following the unseating of the packer.

63.

The Johnston Formation Tester, which forms a part of the accused apparatus, is capable of, has been, and is [71] now used separately from any other apparatus to test the formation penetrated by well bores by sampling the same.

64.

The Johnston Perforating Gun, which is used as a part of the accused apparatus, is also capable of and is used separately from a testing tool or formation tester to perforate well casings in place in a well bore.

65.

No structural modification was necessary, either in the Johnston Formation Tester or the Johnston Perforator Gun, in order to connect them together to form the accused apparatus.

66.

When the Johnston Formation Tester and the Johnston Perforator Gun are connected together and lowered in a well bore for operation, they are each separately operated to perform exactly the same function in the same manner that they perform when run into a well bore separately.

67.

In the use of the accused apparatus, the Johnston Perforating Gun is screwed to the bottom of the Johnston Formation Tester and the two are lowered into the well bore simultaneously, and upon reaching the point of testing, the Johnston Perforator Gun is operated and fired

in precisely the same manner that it is operated and fired when it is run into a well casing for perforating without a Johnston Formation Tester; and after firing the accused apparatus is elevated in the well bore and then the packer of the Johnston Formation Tester is set and the Johnston Formation Tester in all respects is operated precisely as it is operated when it is run into a well bore for making a test [72] without the Johnston Perforator Gun connected therewith.

68.

When a perforating gun is connected to the lower end of a formation tester or sample receiver to be run into a well bore or well casing simultaneously, the operation of the gun does not change or modify the operation of the formation tester or sample receiver, and the operation of the formation tester or sample receiver does not change or modify the operation of the perforating gun.

69.

When a perforating gun is connected to the lower end of a formation tester or sample receiver to be run into a well bore or well casing simultaneously, each device separately operates in its old accustomed manner, and there is no change in the operation of either, save and except the length of the time interval between the operation of the two devices.

70.

In making water shut-off tests in well casing, there is no new or different result obtained by running the accused apparatus to perforate and make such a test over running a formation tester and a perforating gun separately to make the test, except a saving in time required to perform the operations.

71.

Approximately ninety-eight per cent (98%) of the use of the accused apparatus is devoted to making water shut-off tests in well casing.

72.

Approximately two per cent (2%) of the use of the accused apparatus is devoted to making production tests of candidate-oil-producing zones. [73]

73.

Johnston Formation Tester and a separate perforating gun are at present separately run by plaintiff to make production tests of candidate producing zones through well casing approximately ten times more frequently than the accused apparatus, for the reason that in the majority of instances it is more economical for the oil well drilling operators to perforate with a separate gun and test with a separately run tester than it is for them to utilize the accused apparatus, since the accused apparatus can only shoot a limited number of holes and cannot be run economically to shoot the large number of holes ordinarily required in perforating into a candidate oil zone.

74.

In the use of a perforating gun and a formation tester separately for making water shut-off tests in casing, the testing therewith by plaintiff has been one hundred per cent (100%) successful.

75.

If it is necessary to use a bailer or a swab to remove the test sample from the tester after it enters the tester, there is no time saving between running a combined tester and perforating gun over separately running the perforating gun and formation tester.

76.

If the sample must be removed from the formation tester by running a bailing tool into the formation tester to recover the sample, more than one round-trip of the bailer would usually be necessary.

77.

The accused apparatus, exemplified by defendant's Exhibits AH-1, AH-2 and AH-3, does not infringe the Lane [74] patent in suit No. 2,029,491, or any of claims 7-9 inclusive, or 11-14 inclusive, construed as limited to the precise device illustrated and described in said patent.

78.

The accused apparatus is substantially different in construction and mode or principle of operation from the apparatus disclosed in the Lane patent No. 2,029,491 in suit.

79.

The results obtained by the accused apparatus are obtained by a mode of operation substantially different than the mode of operation of the apparatus disclosed in the Lane patent No. 2,029,491 in suit.

80.

Assuming validity of the Spencer patent in suit No. 2,092,337, the accused apparatus, exemplified by defendant's Exhibits AH-1, AH-2 and AH-3, does not infringe the patent, or any of claims 5, 7, 9, 10, 13-15 inclusive, 18, or 28 thereof, construed as limited to the precise device illustrated and described in said Spencer patent.

CONCLUSIONS OF LAW

1.

Prior to the filing of the bill of complaint herein there existed a substantial actual and justiciable controversy between plaintiff and defendant regarding the validity of Lane patent No. 2,029,491 and Spencer patent No. 2,092,337 in suit herein, and the question of their infringement by acts of the plaintiff.

2.

This court has jurisdiction of the cause of action set out in the complaint and the cause of action set out in [75] the counterclaim herein, in that the same are founded upon the patent laws of the United States concerning the validity of Letters Patent of the United States and the question of their infringement by acts of the plaintiff; and jurisdiction is also conferred by § 274D of the Judicial Code [Federal Declaratory Judgments Act, 28 U.S.C. § 400].

3.

This court has jurisdiction of the parties.

4.

Although doubt exists whether the device of the Lane patent in suit involves more than a mere aggregation of old elements which produce a result not different in kind from that produced by using a formation tester and a perforating gun separately, that doubt must be resolved in favor of invention because of the presumption of validity arising from issuance of letters patent by the Patent Office; and it is therefore concluded that the Lane patent discloses a patentable invention.

5.

While it is doubtful whether, in effecting the combination of perforator and tester, more than the ingenuity involved in the work of a mechanic skilled in the art was called into play, that doubt must be resolved in favor of invention because of the presumption of validity arising from issuance of the patent; and it is therefore concluded that the Lane patent discloses a patentable invention.

6.

Although doubt exists whether the Lane patent in suit describes and claims the alleged invention with the definiteness and specificity required by R.S. § 4888, that doubt must be resolved in favor of validity because of the [76] presumption of validity arising from issuance of the patent; and it is therefore concluded that claims 7-9 inclusive, and 11-14 inclusive, of the said Lane patent comply with R.S. § 4888 and are valid.

7.

The Lane patent No. 2,029,491 is valid as to claims 7-9 inclusive, and 11-14 inclusive.

8.

Inasmuch as the Lane patent in suit No. 2,029,491 was issued February 4, 1936, on an application originally filed in 1932, and no apparatus for practical use has ever been built and commercially used in accordance with it, the patent must be held to be of that class as to which there is no room for equivalents, and the claims thereof must be limited to the precise device shown in the patent; and so limited, plaintiff's accused apparatus, exemplified by defendant's Exhibits AH-1, AH-2 and AH-3, does

not infringe the Lane patent in suit, or any of claims 7-9 inclusive, or 11-14 inclusive thereof.

9.

To sustain a charge of infringement of a patented apparatus, there must be found in the accused apparatus substantial identity of result, substantial identity of means, and substantial identity of mode of operation.

10.

To make one apparatus the equivalent of the other, it must appear that it not only produces the same effect, but that effect is produced by substantially the same mode of operation.

11.

The accused apparatus being substantially different both in construction and mode of operation from that [77] disclosed in the Lane patent No. 2,029,491 in suit, a charge of inringement cannot be sustained.

12.

Plaintiff is entitled to a declaratory judgment that the accused apparatus of plaintiff, exemplified by defendant's Exhibits AH-1, AH-2 and AH-3, has not infringed the Lane patent in suit No. 2,029,491, or any of claims 7-9 inclusive, or 11-14 inclusive thereof.

13.

The act of producing the device disclosed in the Spencer patent No. 2,092,337 amounted to no more than mechanical skill in view of the disclosure in the Lane patent in suit, and did not rise to the dignity of invention; hence said Spencer patent is invalid for want of invention.

14.

Plaintiff is entitled to judgment declaring claims 5, 7, 9, 10, 13-15 inclusive, 18 and 28 of the Spencer patent in suit No. 2,092,337 to be invalid and void in law.

15.

Inasmuch as the Spencer patent in suit No. 2,092,337 was issued September 7, 1937, on an application originally filed in the year 1935, and no apparatus for practical use has ever been built and commercially used in accordance with it, even assuming validity, the patent must be held to be of that class as to which there is no room for equivalents, and the claims thereof much be limited to the precise device shown in the patent; and so limited, plaintiff's accused apparatus, exemplified by defendant's Exhibits AH-1, AH-2 and AH-3, does not infringe the Spencer patent in suit, or any of claims 5, 7, 9, 10, 13-15 [78] inclusive, 18 or 28 thereof.

16.

Plaintiff is entitled to a declaratory judgment that the accused apparatus of plaintiff, exemplified by defendant's Exhibits AH-1, AH-2 and AH-3, has not infringed the Spencer patent in suit No. 2,092,337, or any of claims 5, 7, 9, 10, 13-15 inclusive, 18 or 28 thereof.

17.

Plaintiff is entitled to an injunction as prayed.

18.

Plaintiff is entitled to judgment dismissing defendant's counterclaim.

19.

Plaintiff is entitled to recover costs and disbursements herein.

Judgment will be entered accordingly.

February 26, 1948.

WM. C. MATHES,

United States District Judge

[Endorsed]: Filed Feb. 26, 1948. Edmund L. Smith,
Clerk. [79]

In the District Court of the United States
Southern District of California
Central Division

Civil Action No. 5295-WM

M. O. JOHNSTON OIL FIELD SERVICE CORPO-
RATION, a corporation,

Plaintiff,

v.

LANE-WELLS COMPANY, a corporation,

Defendant.

FINAL JUDGMENT

This cause having come on to be heard upon the issues raised by the complaint and answer, and the counterclaim and answer to the counterclaim, and the court having filed its findings of fact and conclusions of law, It Is Ordered, Adjudged and Decreed:

I.

That plaintiff, M. O. Johnston Oil Field Service Corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of California.

2.

That defendant, Lane-Wells Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having a place of business [80] in the county of Los Angeles, State of California, and has designated an agent in the city of Los Angeles, county of Los Angeles, State of California, for service of process in conformity with the laws of the State of California.

3.

That this court has jurisdiction of this cause and of the parties.

4.

That defendant, Lane-Wells Company, is the owner of the legal title to the two patents in suit, to wit, United States Letters Patent Nos. 2,029,491 and 2,092,337, as the assignee of the Technicraft Engineering Corporation.

5.

That the Lane patent in suit No. 2,029,491 is valid as to claims 7-9 inclusive, and 11-14 inclusive.

6.

That the Spencer patent in suit No. 2,092,337 is invalid as to claims 5, 7, 9, 10, 13-15 inclusive, 18 and 28.

7.

That plaintiff, M. O. Johnston Oil Field Service Corporation, has not infringed the Lane patent in suit No. 2,029,491, or any of claims 7-9 inclusive, or 11-14 inclusive thereof, by the manufacture or sale or use of the apparatus exemplified by defendant's Exhibits AH-1, AH-2, and AH-3.

8.

That plaintiff, M. O. Johnston Oil Field Service Corporation, has not infringed the Spencer patent in suit No. 2,092,337, or any of claims 5, 7, 9, 10, 13-15 inclusive, 18 or 28 thereof, by the manufacture or sale or use of the apparatus exemplified by defendant's Exhibits [81] AH-1, AH-2 and AH-3.

9.

That a writ of injunction issue enjoining and restraining defendant, Lane-Wells Company, and its officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with all or any of them as provided by Rule 65(d) of the Federal Rules of Civil Procedure, from threatening any of plaintiff's customers or dealers, or any present or prospective sellers, dealers or users of plaintiff's apparatus consisting of a Johnston Formation Tester and Johnston Perforator Gun, exemplified by defendant's Exhibits AH-1, AH-2 and AH-3, with infringement litigation; and from notifying or charging plaintiff or any of such customers, dealers or users, either verbally or in writing, with infringement of Lane Letters Patent in suit No. 2,029,491, or Spencer Letters Patent in suit No. 2,092,337, if they or any of them should sell or offer for sale or use, or permit the use on their properties, or for their benefit, of plaintiff's said device; and from commencing in this or in any other court against any customer or dealer or user of plaintiff's said device, any suit for alleged infringement of the Letters Patent here in suit, to wit, Lane No. 2,029,491 and Spencer No. 2,092,337, because of the making or using or selling, or offering for sale or use, or permitting the use, of plaintiff's device, to wit, the combined Johnston Formation Tester and Johnston Perforator Gun, exemplified by defendant's Exhibits AH-1, AH-2 and AH-3 herein.

10.

That the counterclaim of the defendant herein be and the same is hereby dismissed as to the plaintiff. [82]

11.

That plaintiff recover from defendant its costs and disbursements in this suit, to be taxed by the Clerk, in the sum of \$.

February 26, 1948.

WM. C. MATHES

United States District Judge

Judgment entered Feb. 26, 1948. Docketed Feb. 26, 1948, C. O. Book 48, page 696. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy.

[Endorsed]: Filed Feb. 26, 1948. Edmund L. Smith, Clerk. [83]

[Title of District Court and Cause]

ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL AND DEFENDANT'S MOTION UNDER RULE 52(b) F.R.C.P. TO AMEND FINDINGS AND CONCLUSIONS AND MAKE ADDITIONAL FINDINGS

The Defendant having filed its Motion for New Trial and Motion Under Rule 52(b) F.R.C.P. to Amend Findings and Conclusions and Make Additional Findings, and Defendant having filed its memoranda in support of said motions, and Plaintiff having filed its memoranda in opposition to said motions, and a hearing having been had on said motions, Plaintiff being represented by Mellin and Hanscom. Oscar A. Mellin, Esq., Hill, Morgan & Farrer,

and William M. Farrer, Esq., and Defendant being represented by Harris, Kiech, Foster & Harris and Ward D. Foster, Esq., and the Court having fully considered the same,

It Is Hereby Ordered That:

(1) The Findings of Fact and Conclusions of Law heretofore made are amended as follows: [84]

(a) After Finding of Fact No. 19 add:

—The following steps in the performance and use of the tool of the Lane patent in suit, No. 2,029,491, s described in such Lane patent, are identical with the steps in the performance and use of the Johnston accused tool as exemplified by Defendant's Exhibits AH-1, AH-2, and AH-3:

1. The elements are assembled into a combined tool including a gun perforator, packer, and tester.
2. The combined tool is lowered in the well to the point where it is desired to perforate.
3. The gun is fired to perforate the casing.
4. Several guns are fired successively.
5. The drill pipe is rotated one turn to the left to unlatch the packer and set the slips.
6. The weight of the drill pipe is lowered on the slips to set the packer.
7. The drill pipe or tubing is open to the formation below the set packer.
8. The entrance valve into the tool is left open until a sufficient quantity of the test liquids is secured in the tool. — [85]

(b) Insert as a part of Findings of Fact No. 42 and preceding the paragraph heretofore constituting Finding of Fact No. 42 the following:

—The combination of a perforator and tester such as that described in the Lane patent in suit, No. 2,029,491, accomplishes under certain conditions a saving of time and money over the separate use of its elements. —

(c) In Finding of Fact No. 78, page 17, line 6, of the findings heretofore made, strike out the words “or principle.”

(2) With respect to the Findings of Fact and Conclusions of Law heretofore made and sought to be stricken by Defendant’s said motions and with respect to all of the additional findings requested to be made by Defendant’s said motions, and in all other respects, said motions of Defendant are denied.

Dated: At Los Angeles, California, this 8 day of April, 1948.

WM. C. MATHES,
Judge.

Approved As To Form, this 7th day of April, 1948.
Mellin and Hanscom, Oscar A. Mellin, Hill, Morgan & Farrer, William M. Farrer, By Oscar A. Mellin, Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 9, 1948, Edmund L. Smith, Clerk. [86]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that Lane-Wells Company, the Defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the following parts, and each thereof, of the judgment entered in this action on the 26th day of February, 1948:

(a) Paragraph 7;

(b) Paragraph 9 in so far as it relates to Lane Letters Patent No. 2,029,491;

(c) Paragraph 10.

Dated: At Los Angeles, California, this 5th day of May, 1948.

HARRIS, KIECH, FOSTER & HARRIS
WARD D. FOSTER
WARREN L. KERN

By Ward D. Foster

Attorneys for Defendant

[Endorsed]: Filed & Mld. copy to Hill, Morgan & Farrer, May 5, 1948. Edmund L. Smith, Clerk. [87]

[Title of District Court and Cause]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT
UNDER RULE 73b FEDERAL RULES OF
CIVIL PROCEDURE

Comes now plaintiff-appellant, M. O. Johnston Oil Field Service Corporation, above named, and gives notice that it hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on February 26, 1948, limited to the extent that said Judgment holds Lane patent No. 2,029,491 and claims 7, 8, 9, 11, 12, 13 and 14 thereof valid and fails to hold said patent and all the claims thereof invalid.

Dated: May 10, 1948.

HILL, MORGAN & FARRER
MELLIN AND HANSCOM
OSCAR A. MELLIN

By Oscar A. Mellin
Attorneys for plaintiff-appellant [88]

[Proof of Service]

[Endorsed]: Filed May 11, 1948. Edmund L. Smith,
Clerk. [89]

NATIONAL AUTOMOBILE AND CASUALTY
INSURANCE CO.

Los Angeles

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 5295-WM Civil

M. O. Johnston Oil Field Service Corporation, a corporation,
Plaintiff,

vs.

Lane-Wells Company, a corporation,
Defendant.

UNDERTAKING FOR COSTS ON APPEAL

Whereas, M. O. Johnston Oil Field Service Corporation, a corporation, Plaintiff in the above entitled action is about to appeal to the Circuit Court of Appeals for the Ninth Circuit from a judgment entered in said action on the 26th day of April, 1948, in the District Court of the United States, for the Southern District of California, Central Division.

Now, Therefore, in consideration of the premises and of such appeal the undersigned, National Automobile and Casualty Insurance Co., a corporation organized and existing under and by virtue of the laws of the State of California, as Surety, does hereby undertake and promise on the part of the Appellant that said Appellant will pay

all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

In Witness Whereof, the said National Automobile and Casualty Insurance Co., has caused, this obligation to be signed by its duly authorized Attorney-in-fact at Los Angeles, California, and its corporate seal to be hereto affixed, this 11th day of May, 1948.

NATIONAL AUTOMOBILE AND CASUALTY
INSURANCE CO.

(Seal)

By Lloyd H. Johnston

Attorney-in-Fact

State of California
County of Los Angeles—ss.

On this 11th day of May, in the year 1948, before me, Loraine G. Winston, a Notary Public in and for said County and State, personally appeared Lloyd H. Johnston, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the National Automobile and Casualty Insurance Co., and acknowledged to me that he subscribed the name of the National Automobile and Casualty Insurance Co. thereto as surety, and his own name as Attorney-in-Fact.

(Seal)

LORAIN G. WINSTON

Notary Public in and for Said County and State

[Endorsed]: Filed May 12, 1948. Edmund L. Smith,
Clerk. [90]

[Title of District Court and Cause]

CONCISE STATEMENT OF THE POINTS ON
WHICH PLAINTIFF-APPELLANT INTENDS
TO RELY ON APPEAL

Comes now plaintiff-appellant herein, M. O. Johnston Oil Field Service Corporation, and makes the following concise statement of the points on which it intends to rely upon for appeal to the United States Circuit Court of Appeals from the Final Judgment made and entered February 26, 1948, in the above entitled cause:

1. The Court erred in holding United States Patent No. 2,029,491, issued February 4, 1936, good and valid in law, particularly as to claims 7, 8, 9, 11, 12, 13 and 14 thereof. [91]

2. The Court erred in not holding United States Patent No. 2,029,491, issued February 4, 1936, invalid in law in that an abstract idea or conception is not a patentable invention.

3. The Court erred in not holding United States Patent No. 2,029,491, issued February 4, 1936, invalid in law in that only mechanical skill was required to produce the device disclosed in said patent.

4. The Court erred in not holding United States Patent No. 2,029,491, issued February 4, 1936, invalid in law in that connecting two old devices in juxtaposition is unpatentable aggregation and not patentable combination.

5. The Court erred in not holding United States Patent No. 2,029,491, issued February 4, 1936, invalid in law in that it discloses not an invention but merely an aggregation of old elements each performing its separate, old function only.

6. The Court erred in not holding United States Patent No. 2,029,491, issued February 4, 1936, invalid in law in that the device disclosed therein will not work practically in industry when constructed and operated in accordance with the specification and drawings of the patent.

7. The Court erred in not holding United States Patent No. 2,029,491, issued February 4, 1936, invalid in law in that the structure disclosed therein is inoperative.

8. The Court erred in not holding United States Patent No. 2,029,491, issued February 4, 1936, invalid in law in that the device disclosed therein lacks sufficient utility to make it useful in the sense of the patent statutes of the United States. [92]

9. The Court erred in not holding United States Patent No. 2,029,491, issued February 4, 1936, invalid in law in that the patent is insufficient to satisfy the requirements of R. S. 4888, 35 U. S. C. A., §33, in that the only form of construction and the only form of operation of the device disclosed in the patent would not produce any useful result, and the patent therefore fails to disclose a useful and practical invention.

10. The Court erred in not holding United States Patent No. 2,029,491, issued February 4, 1936, invalid in law in that the patent is insufficient to satisfy the requirements of R. S. 4888, 35 U. S. C. A., § 33, in that the only form of construction and only form of

operation of the device disclosed in the patent will not produce any useful result without the use of additional instruments or devices not illustrated or described in the patent.

11. The Court erred in not holding United States Patent No. 2,029,491, issued February 4, 1936, invalid in law in that the claims of the patent are functional, ambiguous and indefinite and fail to comply with R. S. 4888.

12. The Court erred in not holding claims 7, 8, 9, 11, 12, 13 and 14 of Patent No. 2,029,491 to be so indefinite that they fail to comply with the requirements of R. S. 4888, 35 U. S. C. A., § 33, and are invalid.

13. The Court erred in not holding the Lane Patent No. 2,029,491 and each and every claim thereof invalid.

14. The Court erred in not granting the relief as prayed for in the original complaint on file herein.

Dated this 14th day of May, 1948.

HILL, MORGAN & FARRER
WILLIAM M. FARRER
MELLIN AND HANSCOM
OSCAR A. MELLIN

By Oscar A. Mellin

Attorneys for Plaintiff-Appellant [93]

Receipt of a copy of the within Concise Statement of the Points on Which Plaintiff-Appellant Intends to Rely on Appeal is hereby acknowledged this 18th day of May, 1948. Harris, Kiech, Foster & Harris. Ward D. Foster, Attorneys for Defendant.

[Endorsed]: Filed May 18, 1948. Edmund L. Smith, Clerk. [94]

[Title of District Court and Cause]

STIPULATION EXTENDING TIME

It Is Hereby Stipulated, by and between the parties to the above entitled action, through their respective counsel and subject to the approval of the Court, that the time within which Defendant may serve and file a designation of additional portions of the record, proceedings, and evidence to be included in the record on appeal, pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, may be, and hereby is, extended to and including June 7, 1948.

This stipulation is made at the request of Defendant's counsel, whose crowded calendar prevents the thorough requisite examination and consideration of the voluminous record at this time.

Dated: At Los Angeles. California, this 28 day of May, 1948.

HILL, MORGAN & FARRER
WILLIAM M. FARRER
MELLIN AND HANSCOM
OSCAR A. MELLIN,

By William M. Farrer

Attorneys for Plaintiff

HARRIS, KIECH, FOSTER & HARRIS
WARD D. FOSTER
WARREN L. KERN

By Ward D. Foster

Attorneys for Defendant

Approved and It Is So Ordered, this 28 day of May, 1948.

WM. C. MATHES
Judge.

[Endorsed]: Filed May 28, 1948. Edmund L. Smith,
Clerk. [100]

The premium charged for this bond
is \$10.00 per annum

In the District Court of the United States for the
Southern District of California
Central Division
No. 5295-WM

M. O. Johnston Oil Field Service Corporation,
Plaintiff,

vs.

Lane-Wells Company,
Defendant.

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, that Fidelity and Deposit Company of Maryland, a corporation, organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto M. O. Johnston Oil Field Service Corporation, Plaintiff in the above entitled case, in the penal sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to be paid to said Plaintiff, its successors, assigns or legal representatives, for

which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, that

Whereas, Lane-Wells Company, has appealed or is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment holding Lane Patent No. 2,029,491 not infringed by the Plaintiff, and entered on February 26th, 1948, by the United States District Court for the Southern District of California, Central Division, in the above entitled action.

Now, Therefore, if the above named appellants shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void, otherwise to remain in full force and effect [101]

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 28th day of May, 1948.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

By L. D. Jenson

Attorney in Fact

Attest S. M. Smith

Agent

State of California,
County of Los Angeles—ss:

On this 28th day of May, 1948, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared L. D. Jensen, known to me to be the Attorney-in-Fact, and S. M. Smith, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

(Seal)

THERESA FITZGIBBONS

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires May 3, 1950.

Examined and recommended for approval as provided in Rule 8. Harris, Kiech, Foster & Harris, Warren L. Kern, Attorneys

[Endorsed]: Filed Jun. 3, 1948. Edmund L. Smith,
Clerk. [102]

[Title of District Court and Cause]

CONCISE STATEMENT OF DEFENDANT-
APPELLANT'S POINTS ON APPEAL

Now comes Defendant-Appellant herein, Lane-Wells Company, and makes the following concise statement of the points upon which it intends to rely for appeal to the United States Circuit Court of Appeals from the Final Judgment made and entered February 26, 1948, in this cause:

1. The Court erred in holding that Plaintiff has not infringed the Lane patent No. 2,029,491 and claims 7 to 9, inclusive, and 11 to 14, inclusive, thereof and in failing to find that Plaintiff has infringed such patent and claims, by the manufacture, sale, and use of the apparatus exemplified by Defendant's Exhibits AH-1, AH-2, and AH-3. [106]

2. The Court erred in holding that the Lane patent No. 2,029,491 must be held to be of that class as to which there is room for absolutely no equivalents whatsoever and that the claims thereof must be limited to the precise device shown in the patent because of lack of commercial use of the apparatus illustrated and described in said patent.

3. The Court erred in failing to apply any range of equivalents whatsoever to the Lane patent No. 2,029,491 or claims 7 to 9, inclusive, and 11 to 14, inclusive, thereof.

4. The Court erred in failing to apply a substantial, or any, range of equivalents to the Lane patent No.

2,029,491 or claims 7 to 9, inclusive, and 11 to 14, inclusive, thereof in accordance with the meritorious nature of the invention.

Dated: At Los Angeles, California, this 7th day of June, 1948.

HARRIS, KIECH, FOSTER & HARRIS
WARD D. FOSTER

By Ward D. Foster

Attorneys for Defendant-Appellant

Received copy of the within this 10th day of June, 1948, Oscar A. Mellin, Attorney for Plaintiff.

[Endorsed]: Filed Jun 11, 1948. Edmund L. Smith, Clerk. [107]

[Title of District Court and Cause]

STIPULATION AND ORDER RE EXTENSION OF
TIME FOR FILING RECORD ON APPEAL
AND DOCKETING APPEAL AND RE TRANS-
MISSION OF ORIGINAL EXHIBITS TO THE
APPELLATE COURT

It Is Hereby Stipulated, by and between the parties to the above entitled cause, through their respective attorneys and subject to the approval of the Court, that the time within which the record on appeal may be filed and the appeals docketed in the Appellate Court, as regards the appeals taken by both parties hereto, may be extended to and including August 2, 1948, and that all original ex-

hibits identified in all designations of portions of the record on appeal, filed pursuant to Rule 75 of the Federal Rules of Civil Procedure by either party hereto, shall be duly certified by the Clerk of this Court and sent to the Appellate Court in lieu of copies as part of the record on appeal, said [110] original exhibits to be returned to the Clerk of this Court when no longer needed by the Appellate Court.

Dated: At Los Angeles, California, this 8th day of June, 1948.

HARRIS, KIECH, FOSTER & HARRIS
WARD D. FOSTER

By Ward D. Foster

Attorneys for Defendant

MELLIN AND HANSCOM
OSCAR A. MELLIN
HILL, MORGAN & FARRER
WILLIAM M. FARRER

By Oscar A. Mellin

Attorneys for Plaintiff

Approved and It Is So Ordered, this 11 day of June, 1948.

WM. C. MATHES

Judge

[Endorsed]: Filed Jun. 11, 1948. Edmund L. Smith,
Clerk. [111]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 116, inclusive, contain full, true and correct copies of Complaint; Notice of and Motion for More Definite Statement and Bill of Particulars; Plaintiff's More Definite Statement and Bill of Particulars; Answer to Complaint and Counterclaim; Answer to Counterclaim; Pre-Trial Stipulation; Defendant's Answers to Plaintiff's Interrogatories Nos. 5 to 12, 17, and 19 to 21; Minute Order Entered January 20, 1948; Findings of Fact and Conclusions of Law; Final Judgment; Order on Defendant's Motion for New Trial and Defendant's Motion to Amend Findings and Conclusions and Make Additional Findings; Notices of Appeals; Undertakings for Costs on Appeals; Statements of Points on Appeals; Designations of Record on Appeals; Designations of Additional Portions of Record on Appeals; Stipulation and Order Extending Time to File Designation; and Stipulation and Order Extending Time to File Record and Docket Appeals which, together with original Plaintiff's Exhibits 1 to 10, inclusive; 11a, 11b, 11c, 12a, 12b, 12c, 13, 14, 16, 17a to 17w, inclusive, 18 to 22, inclusive, 24, 25, 27, 28, 31, 33 to 35, inclusive, 36a, 36b, 37, 38a and 38b and original Defendant's Exhibits E, F-1 to F-8, inclusive, G, K, L, M, O-1, O-2, P, Q, R, T, V-1, V-2, Z, AA-1 to AA-7, inclusive, AB, AD, AE, AE-1, AF, AG, AH-1,

AI-1 to AI-3, inclusive, AK, AL, AM-1, AM-2 and 30-B-1 to 30-B-5, inclusive, and copy of Reporter's Transcript of Proceedings on July 15, 16, 17 and 18, 1947; November 25 and 26, 1947; December 12, 16, 17 and 18, 1947 and January 16 and 20, 1948, transmitted herewith, constitute the record on appeals to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$27.70 of which sum one-half has been paid by each of the appellants.

Witness my hand and the seal of said District Court this 1 day of July, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Title of District Court and Cause]

Honorable William C. Mathes, Judge Presiding
REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, July 15, 1947

Appearances:

For the Plaintiff: Hill, Morgan & Farrer, by William M. Farrer, Esq., 1007 Title Guarantee Building, Los Angeles, California, and Mellin and Hanscom, by Oscar A. Mellin, Esq., 4th Floor, 79 Post Street, San Francisco, California.

For the Defendant: Harris, Kiech, Foster & Harris, by Ward D. Foster, Esq., and Ford W. Harris, Jr., Esq., 471 Chamber of Commerce Building, 1151 South Broadway, Los Angeles, California. [1*]

* * * * *

The Court: In fact, I take it from Mr. Mellin's opening statement that the plaintiff not only knew about them but he made an extensive study of the patents outstanding and the prior art and made tests and experiments.

Mr. Foster: Yes. My precise point was that before he started any development work upon the combined tool here in issue he admittedly had full knowledge of the two patents here in suit.

The Court: As I say, I take it there will be no issue as to that?

Mr. Mellin: No, your Honor, none whatsoever. [39]

* * * * *

Mr. Mellin: If your Honor please, it specifies if those claims are valid and if the court interprets them literally as written and applies them literally as written they are infringing. That far we admit. But in view of all the rules of law—Mr. Foster knows them the same as I do—there are many instances in a patent case, including the fact that there are mere paper patents and this own court's rule has [40] been to that effect and the court construes those claims and construes what they mean and applies them differently under different circumstances.

Now, we do not mean to imply by that that under all circumstances those claims were infringed. We merely stated if the court applies them as literally worded and literally applies them, which the court seldom does in a patent case—Judge McCormick in one case—I do not have it in front of me now but I can bring it in, and it was in a well tool case. He said that in view of the fact it was a paper patent he would not construe the claim to read upon the defendant's structure but that he would confine the scope of the claim to the precise device illustrated by the patent. So, it is a matter of construction for the court and that is exactly what we have written. If this court construes these literally and applies them literally as worded then we infringe, but we say if the court gives the construction they are entitled to and applies them as the court should, then we do not infringe. I think that language is clear. [41]

* * * * *

The Court: Let me see if I understand your contention. Your contention is that if the invention is as broad as it is claimed in those claims and those claims are valid then plaintiff concedes that his device infringes. If the claims are valid and are more narrowly construed than the literal reading of them you reserve the right to contend that your device does not infringe on a narrower construction of those claims?

Mr. Mellin: Yes. I think it all depends on the construction the courts put on it.

The Court: If they are as broad as claimed and are valid [42] in that breadth, to that extent, you freely concede there has been infringement.

Mr. Mellin: I think the court just put, in other words, exactly what I pleaded.

Mr. Foster: That applies to both patents, Mr. Mellin?

Mr. Mellin: Of course. [43]

* * * * *

Mr. Foster: I have in mind as one thing, your Honor, whether or not they were going to offer proof or attempt to prove damage to the plaintiff from the holding out by the defendant of its patents as valid and infringed.

The Court: There is no claim for damages here.

Mr. Mellin: No. [50]

* * * * *

Mr. Mellin: Mr. Johnston, will you take the stand?

M. O. JOHNSTON,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:-

The Clerk: State your full name.

The Witness: M. O. Johnston.

Direct Examination

By Mr. Mellin:

Q. Will you give your name, age, and residence, Mr. Johnston?

A. M. O. Johnston. Age 52. 1661 Grandview, Glendale, California.

Q. What is your occupation?

A. President of the M. O. Johnston Oil Field Service Corporation and Johnston Testers.

Q. What is the Johnston Testers?

A. Johnston Testers is a corporation operating in the Mid-Continent. [51]

Q. And the M. O. Johnston Oil Field Service Corporation is the plaintiff here?

A. Yes.

Q. And what is its business?

A. Its business is testing oil wells.

Q. Will you also state whether or not it also manufactures and sells oil well testers in foreign fields?

A. Yes, sir.

Q. You said "testing oil wells." Will you state whether or not you mean by that the testing of oil wells by removing a sample of fluid from a well bore?

A. Yes, sir.

Q. Now, I hand you two catalogs and ask you if these disclose the Johnston tester which the M. O. Johnston Oil Field Service Corporation utilizes in its business?

A. They do.

(Testimony of M. O. Johnston)

The Court: You mean each of them does?

The Witness: Yes, sir.

Mr. Mellin: May I offer those in evidence, your Honor?

Mr. Foster: What is the date of the publication? What is the purpose of the offer, Mr. Mellin?

Mr. Mellin: One is 1944 and this one—

Q. By Mr. Mellin: What is the date of the publication—the one I have in my hand, entitled “Johnston Testers”, do you know? [52]

A. I don’t know.

Q. Is that the 1946 catalog?

A. I don’t know. I think it is. I am not sure.

Mr. Mellin: The 1944 catalog is offered as Plaintiff’s Exhibit 5, and the other one is offered as Plaintiff’s Exhibit 6.

Mr. Foster: Objected to as no proper foundation and not properly identified, immaterial and irrelevant. [53]

* * * * *

The Court: The objection is overruled. The 1944 catalog will be marked Plaintiff’s Exhibit 5 in evidence.

(The catalog referred to was marked Plaintiff’s Exhibit 5, and was received in evidence.)

Mr. Mellin: If your Honor please, I have a book of prior art patents, a copy of which I have furnished to counsel. [57]

The Court: What do you expect to do with respect to the other document the witness identified?

Mr. Mellin: I offer that in evidence, the present-day Johnston tester.

Mr. Foster: The same objection.

(Testimony of M. O. Johnston)

The Court: That is offered as the 1946 publication?

Mr. Foster: The same objection, your Honor.

Mr. Mellin: Yes, it is.

The Court: Very well. The objection is overruled and the 1946 catalog is received as Plaintiff's Exhibit 6. [58]

* * * * *

The Court: You desire to have them marked as Plaintiff's Exhibit 17?

Mr. Mellin: 17, 17-A and so forth.

The Court: For identification?

Mr. Mellin: For identification.

The Court: They will be so marked. The book will be marked as Exhibit 17, for identification, and the patents will each be marked seriatim 17-A—you say to 17-Y?

Mr. Mellin: Just a minute, your Honor, and I will look at my last one.

The Court: For identification? [59]

Mr. Mellin: For identification, 17-X, your Honor.

(The book referred to was marked as Plaintiff's Exhibit 17, and 17-A to 17-X, both inclusive, for identification.)

Q. By Mr. Mellin: What generally has been your experience in the oil fields, Mr. Johnston?

A. About 37 or 38 years.

Q. Does that experience include the drilling of oil wells?

A. Yes, sir.

Q. Does that experience include the testing of oil wells?

A. Yes, sir.

Q. When did you first engage in the testing of oil wells with tools capable of removing a sample of fluid from a well bore?

A. In 1927.

Q. Where was that, please?

A. In Alabama.

(Testimony of M. O. Johnston)

Q. What testing tool did you operate at that time?

A. The Johnston tester.

(A document was handed to Mr. Foster.)

Mr. Foster: I must apologize, your Honor, for taking so long to examine this. We have never seen it before.

The Court: That is quite all right. [60]

Q. By Mr. Mellin: Will you state whether or not that Johnston tester you have just referred to is identical with or different from the Johnston tester which is illustrated on the circular which I hand you?

A. It is the same.

Q. And when was that circular published, if you know?

A. In 1927.

Q. Has that circular been in your possession ever since that time?

A. Yes, sir.

Q. State, if you will, who comprised the Johnston Formation Testing Company at that time.

A. My brother, E. C. Johnston.

Q. Do you know whether or not the circular was circulated among the trade approximately in 1927?

A. Yes, sir.

Mr. Mellin: The circular just identified by the witness is offered in evidence, your Honor.

The Court: You say your brother alone comprised that company, or you and your brother?

The Witness: My brother alone.

Mr. Foster: That is objected to, your Honor, if it is offered as proof of its contents, as hearsay.

The Court: It is offered merely as descriptive, I take it? [61]

Mr. Mellin: Descriptive of the tool which he operated in 1927.

(Testimony of M. O. Johnston)

The Court: The objection is overruled. The circular will be received in evidence and marked as Plaintiff's Exhibit—

Mr. Mellin: 8.

The Court: 8. Or is it 7, Mr. Clerk?

The Clerk: 7 is the next number I have.

The Court: —as Exhibit 7 in evidence.

Mr. Mellin: Your Honor, I have marked all my exhibits, and I notice that in marking them I have made an error and have skipped No. 7. May I mark this 8 and skip No. 7?

The Court: You are offering no Exhibit No. 7?

Mr. Mellin: No, your Honor.

The Court: Is there any reason why this circular should not take No. 7?

Mr. Mellin: Well, no reason, your Honor, except that I have all the exhibits marked, and I have them all mismarked. It is my own error.

The Court: Very well. This 1927 circular will be marked Plaintiff's Exhibit No. 8. I understand you are not to offer any exhibit 7?

Mr. Mellin: That is correct, sir.

The Court: Very well. [62]

(The circular referred to was marked Plaintiff's Exhibit 8, and was received in evidence.)

Q. By Mr. Mellin: That circular, Plaintiff's Exhibit 8, Mr. Johnston, does that accurately illustrate the tester which you operated in 1927? A. Yes, sir.

Q. When did you or your company go into business in well testing in California? A. In 1930.

(Testimony of M. O. Johnston)

Q. Under what name or style did you do business at that time?

A. The Johnston Formation Testing Corporation, Ltd.

Q. And is the present plaintiff the successor to all the business and assets of that corporation which you have just named? A. Yes, sir.

Q. At the time you entered the business in 1930 of testing wells in California, did you or your company employ a testing tool capable of taking a sample from oil well bores? A. Yes, sir.

Q. Now, you are familiar with your patent, 1,901,813, dated March 14, 1933, on an application made April 2, 1932, which is Plaintiff's Exhibit 17-Q, for identification, are you not? A. Yes, sir. [63]

Q. You are familiar with the disclosures of that patent, are you? A. Yes, sir.

Q. Will you state whether or not the testing tool which you operated in California in 1930 conformed substantially to the disclosures in that patent?

A. Yes, sir.

* * * * *

Q. By Mr. Mellin: When did you adopt the design of the well-testing tool known as the Johnston tester and disclosed in the catalogs in evidence as Plaintiff's Exhibits 5 and 6, Mr. Johnston?

Mr. Foster: That is objected to. There is no evidence [64] that the tester was ever known as the Johnston tester.

Q. By Mr. Mellin: What is your present tester known as, Mr. Johnston?

A. The Johnston testers.

(Testimony of M. O. Johnston)

Q. Now, will you tell us when you first changed to the design of testers—by the way, what was the tester known as in 1930? A. The Johnston testers.

Q. When did you change from the design which you testified was disclosed in your patent just referred to to the design of the testing tool shown in the catalogs, Plaintiff's Exhibits 5 and 6?

A. Sometime in the latter part of 1932 or '33.

Q. You are the M. O. Johnston that is the patentee of patent 2,073,107, filed May 19, 1934 and issued March 9, 1937, are you? A. Yes, sir.

Q. And which patent is marked, for identification, as Exhibit No. 17-U. You are familiar with the testing tool disclosed in that patent, are you not?

A. Yes, sir.

Q. Does that patent disclose the testing tool which you testified is known as the Johnston tester, and which you are now using? A. Yes, sir. [65]

Q. That design was adopted by you, you say, in the latter part of 1932?

A. The latter part of '32 or the first part of '33.

Mr. Mellin: Your Honor please, the next exhibit is a page from the publication entitled "Composite Catalog of New and Standard Oil Field Equipment," edition of 1930-32, and it is stipulated between counsel that it was published not later than December, 1932, and that the photostatic copy of page 106 of that publication is a true copy and that it may be offered in evidence in lieu of the original.

The Court: Is it so stipulated, Mr. Foster?

Mr. Foster: Yes, your Honor.

(Testimony of M. O. Johnston)

Q. By Mr. Mellin: I hand you the document which I have just identified—

The Clerk: May I have it to mark it?

Mr. Mellin: Oh, I beg your pardon.

The Court: Do you have a number for that?

Mr. Mellin: 9.

The Court: It will be received in evidence. That is the document just identified, concerning which the stipulation was made?

Mr. Mellin: Yes.

Mr. Foster: I beg your pardon, your Honor?

The Court: That is the document concerning which you have just made the stipulation? [66]

Mr. Foster: The stipulation which he recited. We do object to its reception into evidence on the ground that it is not proof of its contents, your Honor, that it is hearsay as regards the truth of the contents.

The Court: What is the purpose of the offer?

Mr. Mellin: That it is a tool used by him in the latter part of 1933, prior to these patents, your Honor, and I want him to identify the illustration of them as illustrating the tools used at that time, prior to these patents.

The Court: Is there objection to it for that purpose?

Mr. Foster: Not if the witness identifies it.

The Court: Very well. At this time it will be marked Exhibit 9, for identification.

(The photostat referred to was marked Plaintiff's 9, for identification.)

Q. By Mr. Mellin: Mr. Johnston, I hand you a page of the document just discussed, page 109 of the 1930 to 1932 edition of the Composite Catalog, and I ask you

(Testimony of M. O. Johnston)

if you know what those illustrations appearing on those pages are. A. Yes, sir.

Q. Will you state whether or not they disclose Johnston tools which were employed by the plaintiff or its predecessor in interest at the time when you adopted the present design in 1932 or early 1933?

A. Yes, sir. [67]

Q. And do they accurately illustrate the tool which was made by the plaintiff or its predecessor in interest for testing oil wells in California in the latter part of 1932 or the early part of 1933?

A. Yes, sir.

Q. Are those illustrations accurate of the construction of the tool at that time? A. Yes, sir.

Mr. Mellin: I offer it in evidence, your Honor, as Plaintiff's Exhibit 9.

Mr. Foster: Is the offer limited to the illustrations, to the exclusion of the printed descriptions?

Mr. Mellin: Certainly not. I will have him read them, if you want.

The Court: You are not offering then anything but the illustrations?

Mr. Mellin: I am offering it for all it contains, the illustrations and the descriptive of the tools.

The Court: You are offering it all?

Mr. Mellin: Yes.

Q. By Mr. Mellin: Will you read it, Mr. Johnston, and tell us whether or not the description accurately describes the construction and mode of operation of the tool illustrated thereon?

Mr. Foster: That is objected to as immaterial. Mr. [68] Johnston isn't shown to be an expert. He has

(Testimony of M. O. Johnston)

identified the illustrations, and we think that is all that is material.

The Court: It is a question of not only knowing its physical aspects but knowing its mode of operation, and if the language there is accurate, it will probably summarize what he would testify to. Overruled.

Does the description of the device and the mode of operation correctly state the device and how it operates?

The Witness: Yes, sir.

Mr. Mellin: I offer it in evidence.

The Court: Exhibit 9 for identification is received in evidence.

(The photostat, heretofore marked Plaintiff's Exhibit 9, for identification, was received in evidence.)

Q. By Mr. Mellin: Then as I understand it, your testimony, Mr. Johnston, is that since 1930, when you came to California, the plaintiff or its direct predecessor in interest has been continuously engaged in the business in California of operating Johnston well testers?

A. Yes, sir.

Q. State, if you will, when you first saw a gun for perforating well casing.

A. In the latter part of 1929.

Q. Where was that, please? [69]

A. That was in Eldorado, Arkansas.

Q. Will you state the circumstances?

A. I had heard of a gun being used to make perforations sometime in 1929 by Mr. Rembert. In the latter part of 1929 I met Mr. Rembert at the Garrett Hotel in Eldorado, Arkansas, and asked him about the gun, and he told me that he had one in his car. I told him that I was contemplating on going to California and introducing the

(Testimony of M. O. Johnston)

Johnston formation tester, and that I would like to have a license on the gun for the State of California. So he told me that there was on in the back of his car out back of the hotel, and we went out and looked at it, and he said that after I got out he would ship me one.

Mr. Foster: Your Honor please, I have been waiting for something that was not hearsay, but it has all been hearsay to date, and I move to strike all of his answer on that ground.

Mr. Mellin: The fact that he saw the gun is not hearsay.

The Court: Objection overruled. The motion is denied.

Mr. Mellin: Go on, Mr. Johnston. Have you finished your answer?

Read the answer, please.

The Court: Read it, please.

(The answer was read.)

Q. By Mr. Mellin: Did he so ship you a gun, Mr. Johnston? [70] A. Yes, sir.

Q. When was that?

A. That was in September, 1930.

Q. Now, I hand you what appears to be a page from the publication, "The Oil Weekly," Volume 58, No. 11, published August 29, 1930, and ask you if you can identify the matter illustrated and described thereon.

A. Yes, I can.

Q. What is it? A. It is the Rembert gun.

Q. And a description of the operation of the Rembert gun? A. Yes, sir.

Q. And does that conform to the gun which Mr. Rembert shipped you? A. The same.

The Court: Is that R-e-m-b-e-r-t?

(Testimony of M. O. Johnston)

The Witness: Yes, sir.

Mr. Mellin: R-e-m-b-e-r-t. I offer that in evidence, your Honor, as Plaintiff's Exhibit next in order, and I would like to read into evidence at this time this stipulation—

The Court: Just a moment before you go on with that. Are you offering the illustration and the language?

Mr. Mellin: And the language, your Honor, as being a publication published in "The Oil Weekly," Volume 58, No. 11, [71] of August 29, 1930. The stipulation is that the photostatic copy of page 45, which is the page in question, is a true copy of page 45 of said publication, and that said copy may be received in evidence with the same force and effect as the original.

Mr. Foster: Now, your Honor, this article contains a lot of factual statements, apparently by Mr. Rembert. There is considerable doubt in my mind about them. I began to consider this scheme and wrote to several large arms manufacturers to learn so-and-so. I received replies to my letters of inquiry and through continuous study I was able to overcome all the difficulties.

The Court: That is just puffing, isn't it?

Mr. Foster: It is just what, your Honor?

The Court: It is just puffing and does not affect the situation here, if it is stipulated it was published. I take it, it is not being offered for the purpose of proving that everything thereon contained is true, but just to prove it was said?

Mr. Mellin: Just to prove it was published at that time, and that the illustration is the gun shown Mr. Johnston.

Mr. Foster: With that understanding, there is no objection.

(Testimony of M. O. Johnston)

The Court: It will be received and marked Plaintiff's Exhibit— [72]

The Clerk: 10, your Honor.

(The photostat referred to was marked Plaintiff's Exhibit 10, and was received in evidence.)

Mr. Foster: What is that page, page 45?

Mr. Mellin: The Oil Weekly, page 45 of The Oil Weekly.

Q. By Mr. Mellin: Mr. Johnston, I show you the Rembert patent, 1,835,722. It is dated December 8, 1931 on the application filed January 9, 1930. Have you previously looked at the illustrations of that patent and read the disclosures?

The Court: Is it a part of Exhibit 17?

Mr. Mellin: That is right, your Honor, 17-M.

The Witness: Yes, I am sure that I have.

Q. By Mr. Mellin: Now, will you state whether or not the gun which Mr. Rembert shipped you substantially conforms or not to the gun illustrated and described in the patent to which I have just referred?

A. Yes, sir.

Mr. Mellin: That patent, of course, is offered in evidence under that number, your Honor.

The Court: Not at this time?

Mr. Mellin: Not at this time.

The Court: You say it does depict the Rembert gun,—

The Witness: Yes, sir.

The Court: —in Exhibit 17-M, for identification? [73]

The Witness: Yes, sir.

(Testimony of M. O. Johnston)

Q. By Mr. Mellin: What, if anything, did you do at that time, that is, the time when Mr. Rembert sent you this gun, which I understand was in 1930—

A. September, 1930, yes.

Q. —towards developing and commercializing a casing perforating gun,—if anything?

A. I took the Rembert gun and experimented with it on top of the ground; that is, digging holes, just test holes to familiarize myself with the shooting of it, because I had never seen the gun shot until I had shot it, and so I experimented with it for some time, and in that manner—

Q. Did you do anything else with respect to guns at that time, perforating casing guns?

A. Yes, sir.

Q. What was that?

A. About the latter part of 1931, or sometime in '31 I started to working with an electrical firing gun.

Q. Was that for the purpose of perforating well casings in well bores? A. Yes, sir.

The Court: Is the Rembert gun a mechanical gun?

The Witness: Yes, sir.

Q. By Mr. Mellin: Now, I show you letters patent, patent to M. O. Johnston, No. 2,048,451, filed December 19, [74] 1932 and issued July 21, 1936, and ask you if the electrical gun that you designed or did experimental work with, as you testified to, is shown in that patent.

A. Yes, sir.

The Court: What is the number of that in Exhibit 17, for identification, or the letter?

Mr. Mellin: That is 17-T, your Honor.

(Testimony of M. O. Johnston)

Q. By Mr. Mellin: Did you go on and commercialize those guns at that time or not?

A. No, sir, I did not.

Q. Will you state the reason, if there is any, for your discontinuing the commercialization of those guns at that time?

A. I learned of the Mims patent sometime in 1932 and was advised that if I commercially shot any kind of a gun that I would be infringing the Mims patent.

Q. Is that the Mims patent No. 1,582,184, filed March 3, 1924 and issued April 27, 1926, and which is marked 17-G, for identification, which I now show you?

A. Yes, sir, that is it.

The Court: Is that M-i-m-s?

Mr. Mellin: M-i-m-s, yes, your Honor.

Q. By Mr. Mellin: When did you next commence to commercialize, with the end in view of commercializing casing perforating guns, Mr. Johnston? [75]

A. In 19—

Q. Just strike that. Your company is now making a gun, is it? A. Yes, sir.

Q. Will you state whether or not that gun is known as the Johnston perforator gun? A. Yes, sir.

Q. When did you commence to work with it, with a view of commercializing it? A. In 1941.

Q. What is the origin,—so far as you know, what is the origin of the design of that gun? I mean, was the original designed at your plant, or was it designed by someone else?

A. It was designed by someone else.

Q. Who was that?

A. Collins and Associates.

(Testimony of M. O. Johnston)

Q. Is that Arthur J. Collins of Corpus Christi, Texas?

A. Yes, sir.

Q. Will you state whether or not you built that gun under a license from the Collins or the patents held by Collins? [76]

* * * * *

Q. By Mr. Mellin: Mr. Johnston, you have seen and read the Collins patents—this is not in that book, your Honor—Nos. 2,295,634, 2,305,139 and 2,307,360?

Mr. Foster: That is objected to.

Mr. Mellin: Just a moment, Mr. Foster. I asked him if he had read them.

The Court: It is preliminary. Overruled.

The Witness: Yes, sir, I have read them.

Q. By Mr. Mellin: Do you understand the gun that is disclosed in there? A. Yes, sir.

Mr. Mellin: If your Honor please, this man has identified himself with the oil industry and the drilling of oil wells and testing of oil wells for 38 years, and the patents are descriptive—[78]

The Court: There is no question pending now.

Mr. Mellin: But I just want to point out that objections to the qualifications of the witness as to reading patents and understanding what is in them are merely—are unnecessary.

Q. By Mr. Mellin: Now, Mr. Johnston, do you know of your own knowledge whether or not the perforating gun which you identified as the Johnston perforating gun conforms substantially or does not conform substantially to the disclosures of those Collins patents? [79]

* * * * *

(Testimony of M. O. Johnston)

The Court: By "disclosures" do you mean the illustrations?

Mr. Mellin: I will limit it to the illustrations, your Honor.

Mr. Foster: May the objection be read, your Honor?

The Court: Please read the objection.

(The objection was read by the reporter.)

The Court: Overruled.

The Witness: Yes, sir.

Mr. Mellin: I offer the book of the Collins patents in suit—there are three patents, your Honor—as Plaintiff's Exhibit 11. [80]

* * * * *

The Court: The book will be received as Plaintiff's Exhibit— [81]

The Clerk: 11.

The Court. —11, and the three patents as 11-A, 11-B, and 11-C.

(The book and patents referred to were marked Plaintiff's Exhibits 11, 11-A, 11-B and 11-C, and were received in evidence.)

Mr. Foster: We haven't secured copies of all three.

Mr. Mellin: I beg your pardon. I have the book and can give it to you. I have an extra copy. I am sorry, I forgot to give it to you.

Q. By Mr. Mellin: Now, prior to the time that you commercialized this Johnston perforator gun, Mr. Johnston, did you do any development work on it?

A. Yes, sir.

Q. Over what period did that extend?

A. About 1941 to 1943.

(Testimony of M. O. Johnston)

Q. Then, as I understand it, to what expense, if any, did you go in this development work on this perforator gun?

A. I went to quite a bit of expense with it.

Q. Was that expense in the development work directed to the gun itself, or was it directed to something else?

A. To the gun itself.

Q. State whether or not you did any research work on the matter of connecting the gun to the tester?

A. No, sir. [82]

Q. Did you go to any expense in that connection?

A. Oh, five or six dollars.

Q. Now, does the plaintiff assemble a Johnston tester, a pressure recorder and a Johnston perforator gun in that order on the lower end of tubing for lowering into a well bore to, first, perforate the casing, and thereafter test the well?

A. Yes, sir.

Q. And what advantages obtain by running those three tools in that manner in a well bore, Mr. Johnston?

A. The saving of time.

Q. By that you mean what?

A. Well, in running the tester and the gun together, it is just one service, and we save time by running the two together overrunning the line gun, then removing the line gun and then running the tester in and removing the tester.

The Court: Mr. Johnston, if I were drilling a well and ordered one company to come out and perforate the casing and another company to come out and run a test, how much time would I save if I had one concern, such as the plaintiff here, do both at the same time?

(Testimony of M. O. Johnston)

The Witness: Well, your Honor, the best I can figure out in an overall period from shallow wells to the deepest wells, it would probably be around three hours average.

Q. By Mr. Mellin: Now, Mr. Johnston, when did it [83] become, if you know, rather common to perforate well casing prior to making the water shut-off test in the well?

A. I would say from 1934 up to this time.

Q. During the period from 1934 to 1943, will you state whether or not it was common or uncommon for your company to run your tester after the well had been perforated by some other company?

A. Yes, sir, it was a common thing, a common practice.

Q. And what about today?

A. It is a common practice today.

Q. Were those tests that were made by your tester after the preperforations, which had been previously perforated by running a gun on the line,—were those tests as satisfactory as they are today in the instances where you run the tester with the gun assembled on the lower end of the tubing?

A. Yes, sir, as far as I can determine, they are.

Q. Now, when you speak of a line gun, Mr. Johnston, would you explain that for us, please?

A. A line gun is shot electrically and run on a flexible cable.

Q. As distinguished from running something in on tubing? A. Yes, sir.

Q. And the time required to run a line gun in on a line is very much less, or is it not, than running it in on tubing? [84] A. Much less.

(Testimony of M. O. Johnston)

Q. Now, will you tell us whether or not the plaintiff here operates the tester, the Johnston tester, without the gun on the bottom of it to make tests today?

A. Yes, sir.

Q. Have you likewise used the Johnston perforator gun for perforating casing without it being assembled on the lower end of the tester?

A. Yes, sir, we have.

Q. In that instance will you state whether or not the gun is run in on a tubing, into the hole?

A. Yes, sir.

Q. Now, in what proportion would you say that your company, the plaintiff here, runs the Johnston tester to make a test without also running a gun on its lower end to the times without running a gun on the lower end? Does my question confuse you, Mr. Johnston?

A. Yes, a little.

Q. In other words, I would like to know what proportion of the tests that you were making are made with the tester without a gun?

A. About 75 per cent of the time.

Q. That includes testing in casing and in an open hole?

A. Yes, sir. [85]

Q. Now, let's confine that to where you are making only water shut-off tests in a casing. What proportion of the tests would be run with the gun and what proportion without the gun?

A. About 50 per cent of the time.

Q. Now, will you state, please, what, if any, modification had to be made in the Johnston tester in order to assemble the gun to it?

(Testimony of M. O. Johnston)

Mr. Foster: That is objected to as indefinite unless the Johnston tester that is referred to by counsel is identified.

Q. By Mr. Mellin: The Johnston tester that you are operating today, Mr. Johnston? May I strike that, please?

Is the tester that you are operating today without the gun identical with the tester you operated before you ran the Johnston perforator gun? A. It is, sir.

Q. Now, what changes, if any, did you have to make in the construction or operation of the Johnston tester which you operated before you commercialized the Johnston perforator gun, in order that the Johnston perforator gun could be assembled on the lower end of it?

A. None at all.

The Court: The tester you are referring to that you now use is illustrated in Exhibit 6; is that correct? [86]

Mr. Mellin: Yes, your Honor.

The Court: Which is the catalog, and also in 17-U, for identification?

Mr. Mellin: That is correct, your Honor.

* * * * *

Q. By Mr. Mellin: Mr. Johnston, are you familiar with the operation of the Johnston tester?

A. Yes, sir.

Q. And are you familiar with the operation of the Johnston perforator gun? A. Yes, sir.

Q. Are you familiar with the operation of the Johnston tester and the Johnston perforator gun when the gun is connected to the lower end of the tester and they are run into the hold simultaneously? A. Yes, sir.

(Testimony of M. O. Johnston)

Q. And under those circumstances the gun is first [87] fired to perforate, is it? A. Yes, sir.

Q. And thereafter the tester is operated to test the well? A. Yes, sir.

Q. Now, you are familiar with the operation of the Johnston tester before you commercialized the Johnston perforator gun? A. Yes, sir.

Q. Is that the same or different from the operation of the Johnston tester that is run today with a gun connected on the lower end? A. Exactly the same.

Q. Now, when a Johnston perforator gun is run in on the lower end of a tester, will you state whether or not the operation of the tester is the same or different from the operation of the tester which you ran or which you run without the gun being assembled on the lower end?

A. It is the same.

Q. You have testified, as I understood it, that you have run this Johnston perforator gun without having it connected to the lower end of a tester?

A. Yes, sir.

Q. And you are familiar with that operation?

A. Yes, sir. [88]

Q. Now, will you tell us what differences, if any, and the similarities, if any, there are in the operation of the gun where it is run in on the lower end of the tester or separately from the tester?

A. There is no difference. It is just the same.

Q. Will you state whether or not the procedure of firing the gun, when it is run in on tubing without the tester, is the same or different than when the gun is assembled on the bottom of the tester?

A. Just the same.

(Testimony of M. O. Johnston)

Q. I hand you what purports to be a license agreement, entered into on the 14th day of December, 1942, between A. J. Collins of Corpus Christi, Texas, hereinafter sometimes referred to as Collins, and Johnston Oil Field Service Corporation, a corporation of Houston, Texas, hereinafter sometimes referred to as Johnston, and ask you if you can identify that instrument.

A. That is the license agreement that I entered into. [89]

Q. And I notice this one is not signed by Mr. Johnston. Can you explain that fact?

A. I cannot.

Q. And this is the license that you referred to that you have under the Collins patents?

A. Yes, sir.

Q. I notice that this also—that this is for the Johnston Oil Field Service Corporation, a Texas corporation. Can you explain that fact?

A. The corporation in Texas, of which I am the principal stockholder and president of, we took that in that corporation's name at that time.

Q. And do you pay royalties under this license agreement to Collins?

A. Yes, sir, we do.

Mr. Foster: Objected to as immaterial and not the best evidence.

The Court: Overruled.

Q. By Mr. Mellin: On what testers—I mean what guns that are made by you do you pay royalties under this agreement?

Mr. Foster: Same objection.

The Court: Overruled.

The Witness: The Collins gun.

(Testimony of M. O. Johnston)

Q. By Mr. Mellin: And that is what you referred to as [90] the Johnston perforated gun?

A. Yes, sir.

Mr. Mellin: I offer the license in evidence, your Honor.

Mr. Foster: That is objected to as not the best evidence. It is an unexecuted contract—not a fully executed contract. It constitutes no more than an option and relates to a different entity than the plaintiff here.

The Court: Did you sign a copy of that?

The Witness: Yes, sir.

The Court: Did you deliver a copy to Collins?

The Witness: Yes, sir.

The Court: The licensor?

The Witness: Yes, sir.

The Court: At about the time or the date it bears?

The Witness: Yes, sir.

The Court: Do you own most of the stock of the Texas corporation?

The Witness: Yes, sir.

The Court: How much of the stock do you own?

The Witness: Probably 75 per cent of it.

The Court: And you are president of the company?

The Witness: Yes, sir.

The Court: Who are the other stockholders?

The Witness: Some employees of mine—a brother that I have given stock to. [91]

The Court: You have given stock to him?

The Witness: Yes, sir.

The Court: Who owns the stock in the plaintiff corporation here?

The Witness: Myself and Mrs. Johnston.

The Court: Objection overruled.

(Testimony of M. O. Johnston)

Mr. Mellin: Would it upset our order here if we put that in as Exhibit 7?

The Court: I think it should go in as Exhibit 7. If it doesn't we will be wondering where Exhibit 7 is. That will be marked, the Collins license, as Exhibit 7 in evidence.

(The license referred to was marked as Plaintiff's Exhibit 7, and was received in evidence.)

Mr. Mellin: You may cross examine.

Cross-Examination

By Mr. Foster:

Q. Mr. Johnston, on your direct examination you referred to the casing perforator for oil wells of the Rembert patent 1,835,722, a copy of which I place before you and ask you if you recall your testimony on direct examination that that patent correctly illustrates and describes the tool which you had shipped to you from Arkansas, is that correct? A. Yes, sir.

Q. And the description of it and illustration of it are [92] accurate, are they, with regard to that tool that you tested after it arrived here?

A. Yes, sir, as far as I can see it is practically the same. I cannot recall anything that is different.

Q. That is the perforator which you are now using in combination with the tester and pressure bomb in your combined tool? A. No, sir; it is not.

Q. Your counsel has referred to the fact that you have taken out a number of patents and have been for many years in the oil business. You are able to understand that Rembert patent, its drawings and descriptions

(Testimony of M. O. Johnston)

sufficiently to say that it illustrates and describes the tool that you actually tested?

A. From the face of it, yes, it looks the same.

Q. Now, what would it be necessary to do to the gun perforator that is illustrated in that Rembert patent No. 1,835,722, in order to place it in a combined tool—that is, to combine it with a tester as a unitary tool?

A. Very little.

Q. Would you describe every change which in your opinion would be necessary?

A. Well, I would change the rod that holds the firing member, that strikes a cartridge.

Q. That is the rod 19 you are referring to? [93]

A. Yes, sir.

Q. In your Figure 5? A. Yes, sir.

Q. What change would you make there?

A. I would bend the rod in some manner, place it over near the center where I could run it up in the center of my testing tool.

Q. You would run the rod 19 in Figure 5 upwardly?

A. I don't see that—I can't locate where it is numbered. I think that is 25a, the rod I am referring to.

Q. In what figure, Mr. Johnston?

A. In Figure 6.

Q. Well, that rod 25a you would extend in the center of the tool upwardly to the surface of the ground?

A. Yes. I would enclose it inside the housing and run it up through my testing tool.

Q. And is that the rod which releases the springs to discharge the cartridges?

A. Yes, sir.

Q. Is this tool suspended on a hollow tubing or drill string? A. Yes, sir.

(Testimony of M. O. Johnston)

Q. Where in the patent do you find that teaching?

A. I don't know. I haven't read the patent in years.

Q. Well, if that rod, 37, on which the tool is suspended [94] were a solid rod you would have to change that, wouldn't you? A. 37?

Q. That suspends the tool in the well. If that is solid you would have to make it hollow—make it a hollow tube, would you not? A. Yes.

Q. And what other changes would you make in order to combine this perforator with a tester to provide the combined Johnston combined tester and perforator which you are now using?

A. I wouldn't make any other changes in this gun to combine it with my testing tool other than run the rod up through the center of my testing tool and do some minor packing off.

The Court: The figures you are referring to are all on Exhibit 17-M?

Mr. Foster: Mine are not lettered, your Honor.

Mr. Mellin: 17-M, yes.

The Court: For identification.

Mr. Mellin: Yes.

Q. By Mr. Foster: Now, what do you mean by some changes in the packing off? What would you do?

A. Well, as I run it through the center tube of my testing tool I would have to pack off in the center tube. [95]

Q. Well, do you mean that you would run the gun, Rembert perforator through your testing tool?

A. I would run the rod, Mr. Foster, up through my testing tool—not the gun. The gun would be just screwed on the bottom.

(Testimony of M. O. Johnston)

Q. And you have listed all the changes that would be necessary to make a commercially practical tool from the Rembert patent perforator and a sample tester?

A. I have listed what I thought was the major changes, yes, sir.

Q. Would you list any others that you think necessary to provide commercial advantages of your combined tester and perforator?

A. Not offhand, no, sir.

Q. Now, this tool that you had like this Rembert patent, how did it operate to fire?

A. It operated by driving this rod down and releasing those firing members, striking a firing pin in back of the cartridge.

Q. Now, with reference to this patent—you see the record is not very clear when you say “driving this rod down”. Referring to the drawings of this Rembert patent before you, what was done to cause the gun to fire?

A. That is about the best explanation I can make of driving a rod, which I think is 25a, downward by dropping [96] what is commonly known as a go-devil or rod on top of it.

Q. Well, do I understand that it operated, referring to Figure 5 there, Mr. Johnston, and the rod 37, as I understand suspends the gun. Do you mean a go-devil was dropped down there on the plate 34 so that springs were released to fire the gun?

A. This 37 rod does not fire the gun.

Q. No, you misunderstood me, Mr. Johnston, I think. The rod 37 suspends the gun in the well, does it not?

A. It could, yes. I think it shows that rod 37 suspends the gun.

(Testimony of M. O. Johnston)

Q. Do I understand that to fire the gun a weight or go-devil was dropped down around that rod 37 onto the plate 34 to release the springs which fire the cartridges?

A. That is the way I understood it.

Q. Now, in the test which you performed of the Rembert gun, which was sent to you from Arkansas, how did you fire that gun?

A. We fired it by driving down on that rod and releasing those spring members that were back of the gun.

Q. Do I understand that you dropped down a weight which fitted around this supporting rod until it hit a plate which released springs, is that it?

A. It hit on top—just hit on top of the rod and drove the rods down. This little rod had an offset place [97] made on it and when that rod moved down, why, that spring member dropped off, each one of them. They all dropped off at the same time.

Q. Now, these spring members and so on—it is difficult for one reading the record to know what is meant. Will you point out how the gun that you actually operated, how you fired that gun with reference to the Rembert patent and the numbers given the parts there?

A. Well, the rod 25a and the spring member 21a and this offset place on the rod, it looks like Figure 2aa. That rod was moveable and by driving down the rod 25a the dogs that are made onto that rod released the spring member 21a, the spring member driving a firing pin 19 and striking a cap in the cartridge 15 and firing the bullet at a barrel 16.

Q. This was not the gun that you experimented with to combine with the tester to provide your present combined tool, was it? A. No, sir.

(Testimony of M. O. Johnston)

Q. You mentioned discussing with Mr. Rembert the taking of a license under that patent to make and use this perforator of his patent in California. Did you ever take such a license? A. Yes, sir.

Q. These tests that you performed here in California with the Rembert gun, will you describe them to us? [98]

A. Those tests were test holes dug in the ground like a round hole, like we would dig with a bit, and the casing was placed in this hold and then cement poured around the outside and then we would put the gun inside and we would fire the gun and see what penetration we had to more or less familiarize myself with the gun because I had never operated the gun until it came out here to California.

Q. And that was about 19—

A. It was in September 1930.

Q. Before that time gun perforation was new to you, is that right? You had no personal knowledge of it?

A. Only the personal knowledge I had of Mr. Rembert shooting the gun in Eldorado, Arkansas, which was only hearsay.

Q. Now, how deep were these test holes where you operated the Rembert gun?

A. Oh, they were probably six or seven-foot deep.

Q. Now, did you ever sell any of the Rembert guns?

A. No, sir.

Q. Did you ever make any of them?

A. No, sir.

Q. Why not?

A. Well, I didn't think after my experimenting with the Rembert gun that it would suit the needs of California operators. [99]

(Testimony of M. O. Johnston)

Q. In what respects were the Rembert gun deficient in filling the needs?

A. The sealing for one thing—the sealing means at the cartridge.

Q. You mean the sealing means between the cartridge and the cartridge bore?

A. The cartridge and the opening—the well around it. The hydrostatic head I assumed and later heard that there was quite a few hundred pounds pressure in front of the bullet which would drive the bullet back into your cartridge and destroy, wetting the powder, and it wouldn't perform.

Q. By that you mean—do you mean that if you used this Rembert gun and went down a few hundred feet in a well filled with mud the mud pressure would detrimentally affect the cartridge or the bullet?

A. The bullet, yes.

Q. It would push the bullet back against the cartridge, would it? A. I assumed that, yes.

Q. And that is your engineering experience and your practice in the oil fields and it indicated to you in 1930 that the Rembert gun was impractical at a depth of more than a few hundred feet of mud, is that correct?

A. That is correct, sir. [100]

Q. Now, what other deficiencies were there that caused you to not manufacture or sell the Rembert gun?

A. Well, that deficiency and taking the back off—we also had a sealing problem in taking the back off to set the springs. We had a sealing problem there that would be hard to overcome but I didn't think it was practical to unweld it every time you run one of them. I thought that could be remedied.

(Testimony of M. O. Johnston)

Q. Now, that isn't clear to me, Mr. Johnston. What part here in the patent drawings do you have to unweld or take off each time you run the gun? A. Part 14.

Q. In Figure 1? A. Figure 5.

Q. Part 14? A. Yes.

Q. Do I understand that that part, 14, was a plate that went along a chamber opposite the cartridge?

A. I am pretty sure it is, Mr. Foster. It looks like it.

Q. At any rate, there should be a plate there to make the gun operate? A. Yes, that is correct.

Q. And that plate had to come off every time and that rendered the tool impractical for California operations? [101]

A. Well, it was a sealing problem there and, too, the sand here in California was much greater in depth than we had experienced in Texas or I had experienced, and to run a four-shot gun with all that sealing and shooting maybe 1,000 holes or more, which we do out here with the depth at which we drill, I did not think it was practical to do that. It would be entirely too slow in dragging drill pipe out with the trips back and forth. It would be too slow.

Q. Well, this Rembert device could be made to fire any number of cartridges, as I understand it.

A. Yes, I suppose—yes, it could.

Q. Now, although you took a license wasn't it a factor influencing you not to make this Rembert perforator the fact that you had a rather involved mechanical spring mechanism for firing these guns? Wasn't that it?

A. No, sir; no, sir.

Q. You feel that was all right?

A. That was all right, yes.

(Testimony of M. O. Johnston)

Q. But the principal objection then was that relatively high hydrostatic pressure acting upon the bullet end of the cartridge which rendered the gun impractical?

A. That is correct, and, too, we would like to shoot in opposite directions instead of just one side, and I don't know whether I could have—I didn't think so at the time, but I wondered if I couldn't turn one bullet one way and one [102] the other in this firing mechanism.

The Court: You are referring to the Rembert gun?

The Witness: Yes, sir, the Rembert gun.

Q. By Mr. Foster: Now, why did you take a license under the Rembert patent if you didn't think it was a practical tool?

A. At the time I received this gun I knew very little about it. I had seen it and it had been doing some work and it was the only one that I knew of and I would like to have a license under it if I could make it work. If I could make it work I would certainly try to do so. [103]

Q. But after your testing work, it was your feeling that you wouldn't recommend this patent to anyone to combine with the tester, that you would combine the tester and perforator, that is the tool you are now using; that is true, isn't it?

A. I never thought about recommending it to anyone at the time.

Q. You would not now recommend it to anyone, to combine with a tester?

A. I would have to think that over because I hadn't thought about it.

(Testimony of M. O. Johnston)

Q. At the time you were doing this work, in September, 1930, you had no conception of combining the gun perforator with a tester in a single unitary tool?

A. I can't say that I didn't.

Q. When would you say that you first had the desire or conception of doing that, Mr. Johnston?

A. I may have thought of that when I heard of Mr. Rembert's gun because I had the testing tube, and I wanted the gun. I can't say that I didn't think of the thing.

Q. Nor that you did? A. No, nor that I did.

Q. Can you fix any time when you can state positively that you did have a desire and conception of combining in a unitary tool your gun perforator and the tester? [104] A. Not definitely, no, sir.

Q. I direct your attention to Plaintiff's Exhibit 8, a folder illustrating a Johnston well tester, which I understand you had used. Between what dates did you use that tester? A. From 1927 to 1930.

Q. And that tester, as I understand it, it is used in a rat hole at the bottom of an open well; is that correct?

A. Yes, sir.

Q. And the only packing is between the testing tool and the shoulder which is between the rat hole and the open bore hole; is that right? A. Yes.

Q. Would you describe, in a general way, how that packer is seated and the well fluid gets into it and is withdrawn with the tester from the well?

A. Do you want me to describe the well also?

Q. Yes.

A. I would have to do that to be able to describe it.

(Testimony of M. O. Johnston)

Q. If you will, please.

A. The testing tool is screwed on the bottom of the drill pipe or tubing. This cut shows what we call a formation packer, tapered packer.

Mr. Foster: Pardon me, Mr. Johnston. Is it agreeable to the court and to counsel if we mark the parts he refers to? [105]

Mr. Mellin: They are already marked. Aren't they?

Q. By Mr. Foster: Do they have numbers or legends?

A. "Packer," "Mud," "Emergency Valve," "Valve Spring," and "Main Valve."

Q. Will you describe them, then, with respect to the legends that appear on them?

A. You will have to read my answer.

The Court: Just tell how it works as illustrated on there. That is Exhibit 8, isn't it?

Mr. Foster: Yes, sir.

The Witness: The testing tool is screwed on to the bottom of the tubing, and the tubing or the testing tool itself is not marked, as a whole. The testing tool includes a main valve, which is marked; a valve seat, which is indicated; an emergency valve, which is indicated; a heavy spring, which is not indicated; the tapered packer, which is indicated by "Packer"; a perforated bull plug, which is not indicated. The testing tool is assembled on the tube carrying the mechanical features which I have just mentioned. The packer is tapered, the hole, the main hole carried to the top of the ground is filled with mud, which is indicated. A smaller hole is bored within the oil sand, which is indicated and called a rat hole. We run this assembly to the top of the hole, placing the tapered packer

(Testimony of M. O. Johnston)

which enters the rat hole packer, forming a seal on the shoulder, which is not [106] marked, dividing the main hole into one zone and the rat hole into another, which we call upper and lower zone.

Q. By Mr. Foster: Pardon me, Mr. Johnston. You said that you lowered the conical packer into the rat hole packer. You mean into the rat hole itself, not the packer?

A. That rat hole itself. I beg your pardon. Further downward movement of the drill pipe or tubing after seating on the shoulder of the main hole in the rat hole opens an upwardly-seating valve, the main valve, which maintained the tubing or drill pipe dry all the time we were going into the well, and no fluid had entered the drill pipe until this boxcar spring had collapsed, opening this valve. The packer holding your mud in the main hole, relieving your rat hole, where your test is to start in your sand, open to the atmospheric pressure into the drill pipe or tubing.

The Court: What operates the spring?

The Witness: The downward movement of the pipe. This is packed off here to a telescoping member. This is loose on this member, and there is a nut that tightens up the spring, that draws your valve down tighter to your seat, and this drill pipe or tubing is so heavy when you make that downward movement it collapses the spring, causing the valve to open.

The Court: Is that only when the tubing reaches a point below the packer?

The Witness: It is only when the packer comes in contact [107] with some obstruction that will stop it. When it does, the heavy tubing will slip this down, col-

(Testimony of M. O. Johnston)

lapsing this spring, making this seat move away from that valve.

The Court: In other words, when the wedge-shaped packer reaches the rat hole, that is when that operation occurs, when the spring is supposed to collapse?

The Witness: Yes, sir. When it hits that obstruction, it can't go any farther, and the spring starts collapsing and your seat moves downward, leaving your valve stationary, and your mud starts in—I mean, your test from out of the sands into your perforations upwardly into this valve, and into the empty drill pipe or tubing.

The Court: All right. The valve has been closed up until the point where the spring collapses?

The Witness: Yes, sir.

The Court: Then it opens and permits the pressure to force the fluid up into the tubing; is that correct?

The Witness: Yes, sir. That is the formation pressure. This mud pressure, this casing or open hole in this well will be full, and even to the rat hole, will be full of fluid to the top of the oil well.

The Court: Yes, I understand.

The Witness: Yes, sir.

The Court: The test fluid is supposed to enter through the end of the testing instrument down in the rat hole, is it? [108]

The Witness: Yes, sir, that is correct.

The Court: And how does it close, now?

The Witness: So when we have accumulated all that we want inside the empty drill pipe of the formation fluid,—

The Court: How would you know that?

(Testimony of M. O. Johnston)

The Witness: There is an indication on top of this fluid that we can reach. In the practice at that time, why, we would wet a rag and put it over the top of the tubing, and when the valve would open up the rag would fly up, and as long as your fluid was there the rag would flutter. Sometimes it would be so heavy it would blow off. And when the flow stopped, the rag would settle and rest down, and we would know we had reached our limit.

The Court: Now, it is filled to the desired level with fluid. How does it close?

The Witness: We are attached at the top of the drilling floor with drilling equipment, and we start pulling up on the tubing. The first thing that moves is your spring that is trying to open up, and as we go upward further this valve snaps shut.

The Court: Through weight?

The Witness: Through weight, relieving the weight off of this spring.

The Court: Or relieving the pressure?

The Witness: No, relieving the weight of the drill pipe. [109] As we pull up,—the drill pipe now is seating and, we will say, the entire weight is seating on this spring, the entire weight of the drill pipe.

The Court: About where would that spring rest in this diagram?

The Witness: It would be entirely collapsed.

The Court: Yes, but would it be these round (indicating)—

The Witness: Yes, sir. This is the indication.

The Court: Just opposite the word "mud" on either side?

The Witness: Yes, sir.

(Testimony of M. O. Johnston)

The Court: —of the hole?

The Witness: Yes, sir. That is true, and this is packed off, and this is packed off too, and it is just placed in there, the collapsing member, and we take the tension off of this spring. This is not an exact drawing of the tool; that is, we didn't go into great detail on it.

Q. By Mr. Foster: Mr. Johnston, there is a shoulder shown in Exhibit A8 that the bottom of the main bore hole and the top of the rat hole against which your conical packer seats, is there not? A. Yes, sir.

Q. And isn't it the custom and wasn't it then the custom to seat that conical packer against that shoulder, with the full weight of the drill pipe?

A. That depended on the depth, Mr. Foster. [110]

Q. But at some depths wasn't it the custom to seat the conical packer, marked "Packer," in Exhibit 8, upon this shoulder at the top of the rat hole, with the full weight of the drill pipe?

A. Oh, I think so. I never paid any attention to it. If it was a shallow well, I slacked it all off, and I didn't pay any attention.

Q. But if it was a deep well or if you had a soft formation, you would lower the entire pressure of your drill pipe to seat that conical drill spring?

A. The entire pressure, no. It is according to the depth, because at a great depth in a large hole, if you put your entire weight on that with your limber drill pipe you are likely to crook it.

(Testimony of M. O. Johnston)

Q. Under no circumstances did you ever lower the whole weight of the drill pipe on the conical packer, marked "Packer" in Exhibit 8?

A. Yes, I have, I suppose, in shallow depths, where your drill pipe wouldn't be a burden, and I didn't pay any attention to it. But in a deep well, why, we were careful about how much weight we would put on those.

Q. Well, it was a fact that if you didn't seat that conical packer, marked "Packer" in Exhibit 8, in fluid tight engagement with the shoulder at the top of the rat hole before you opened your main valve, then you would cut that packer out [111] by the circulating or by the mud above the packer being forced down below and dropping into the—

A. Not before we opened the main valve. We have no movement before we open that main valve.

Q. Now, this packer in Exhibit 8 was used only in open-hole testing, was it not? A. Is this Exhibit 8?

Q. Yes.

The Court: The answer is "Yes"?

The Witness: Yes, sir.

Q. By Mr. Foster: It was not used and could not be used in performing a test in casing?

A. I wouldn't say it couldn't be used, but we never used it.

Q. Didn't you always run your tester of Exhibit 8 in an open hole with a jar? A. No, sir.

Q. Never?

A. Yes, sir, we do run jars, but I don't think we run a jar here until, oh, it was probably '33, in competition with the tester.

(Testimony of M. O. Johnston)

Q. And since 1933 have you in open-hole testing usually employed a jar in connection with the tester?

A. That is the privilege of the operator. If they want to use a jar, all right. It is up to them. It is a separate [112] service.

Q. Now, referring again to Exhibit 8, when you opened up the valve marked "Main Valve," you say that the formation liquid would rise up through the tester in the drill pipe to a level indicated by the pressure in the formation?

A. Yes, sir.

Q. And if there were sufficient pressure in the formation, I suppose that the liquid would flow out of the top of the drill pipe at the well?

A. That is correct.

Q. And in such event would you just leave this tester in the well and let the well flow?

A. No. We have had occasions when we have left it in the well and let it flow, but it has been rare indeed, because it is very dangerous to leave a formation tester in a well over any period of time in an open hole.

Q. But you would say that this Johnston tester of Exhibit 8 had utility, in that it would permit the well to flow through it if the pressure were sufficient to make it a flowing well?

A. That is common practice in flow tests, without a tester.

Q. Yes, but I mean you would say that this Johnston well tester did have utility and was desirable in the respect that it would permit the well to flow upwardly through it to [113] the surface, if the pressure were enough in the formation?

A. Yes, sir, it has had utility all the way through.

(Testimony of M. O. Johnston)

Q. In that respect, I say is your answer "Yes"?

A. Oh, yes, I will say "Yes."

Q. Now, with this Johnston well tester of Exhibit 8, was it possible, if the pressure in the formation were low, to run a swab down through the drill pipe and draw liquid from the formation into the tester?

A. It is possible, yes, sir.

Q. You did that?

A. Not in particular drill pipe and tubing. In drill pipe usually it will flow—

Q. Well, in tubing—

A. It is feasible. They don't do it.

Q. But they do it sometimes?

A. In practice it can be done, yes, sir.

Q. And you did it with this tool, Exhibit 8?

A. I never did it with the tool. That is entirely up to the operators, if they do that.

Q. Well, do you recall that between 1927 and 1930, when you were using this well tester, Exhibit 8, swabbing operations were performed while the tester was seated in the hole?

A. Yes, I recall one that I ran myself at Kettleman Hills. I don't know, I think we were testing a pressure bomb, but I think it has been done, Mr. Foster, within my organiza- [114] tion.

Q. Now, what must be done—first, can this Johnston well tester of Exhibit 8 be combined with a perforator to provide the combined perforator and tester which you are now making, and which is the subject of this suit?

A. Yes, sir.

(Testimony of M. O. Johnston)

Q. Would you recommend that a tester, such as in Exhibit 8, be combined with a perforator for any purpose? A. If they wanted to combine—

Mr. Mellin: Just a moment. I object to that question, what he would recommend. What difference would it make? If it is, what is his opinion—

The Court: This is another way of asking that question, whether in his opinion it would be desirable.

Mr. Mellin: He might recommend to sell it.

The Court: I suggest you reframe the question, Mr. Foster.

Q. By Mr. Foster: In your opinion, is this Johnston well tester of Exhibit 8 a desirable construction to combine with a gun perforator to provide a unitary tool, such as is the subject of this suit?

A. Yes, that is all right.

Q. What change would be necessary in the tester of Exhibit 8 in order to combine it with a perforator gun to provide a unitary tool, such as you are now using? [115]

A. There wouldn't be any, other than to put a threaded member down below and a different packer on it.

Q. In other words, you would substitute a different type of packer for the conical packer, and you would put a thread on to the bottom of the tool, a gun perforator?

A. That is if they didn't want to shoot in the formation. If I wanted to shoot in the formation, I would leave the packer, the conical packer on and shoot.

Q. Would you have to put on slips and reins and other like devices? A. No.

(Testimony of M. O. Johnston)

Q. How would you fire the gun which you contemplate attaching to this Exhibit 8?

A. I would put on springs on the gun that would fit the rat hole and go down and turn in the regular way, and fire the gun. Then let down and make my tests.

Q. In other words, you would put on springs such as you now have on your combined tool, to enable you to rotate the upper end of the tubing enough times to fire the gun, such as you have in the combined tool, and then you would use this tester to take the sample through the perforations made by the gun?

A. Whatever it is, if they are going to shoot in the formation the perforations.

Q. You would in casing have to have an entirely [116] different type of packer, would you not?

A. Yes, sir.

Q. You have said that you knew some men in your organization had run a swab down through the tubing in a tester such as Exhibit 8. What was the purpose of that swab, would you tell the court, please?

A. Well, offhand I don't know. The companies run them and the swab is if you probably have a low head well or well that doesn't give up readily. Now, this isn't in a formation test. This is in a casing test I am speaking of.

Q. In other words, it is not an open hole?

A. Not this open hole test. It is a casing test, and through the testing tool it hasn't given up probably what they thought, or maybe it has, but they want to see if they can bring some more in and they run a swab in and relieve that, to bring the fluid out, and they can be doing that and let it come in the testing tool to see if

(Testimony of M. O. Johnston)

there is any mistake made. That is the company's business, it is not mine, and we do not mark it on the tickets.

Mr. Foster: I just wanted to see if my understanding were clear.

The Court: By casing test, you mean, of course, where the casing is perforated by the gun and the fluid is taken into the hole through the casing?

The Witness: Yes, sir. I would go a little further— [117]

The Court: Your open hole tester is such a one as is illustrated on Exhibit 8?

The Witness: Yes, sir. [118]

Q. By Mr. Foster: That swabbing operation as I understand it, serves to draw the liquid from the formation in the tester, is that correct?

A. Mr. Foster, that is a supposition on my part. I don't know what that does.

Q. Well, now, you have been for years in the oil industry and are familiar with all its operations. Isn't that what they use it for?

Mr. Mellin: Just a minute.

The Witness: Not in the testing tool. In the testing tool it is to relieve something. A swab is normally used in casings without a testing tool, to relieve the pressure off of the sands when they are bringing them in. They either use a swab or bailer and dip it out. Now, that is what a swab and a bailer is used for.

Mr. Mellin: Now, if your Honor please, I am going to object to further examination along this line of swabbing. "Swabbing" is a well operation entirely distinct from testing or shooting or any of the issues.

(Testimony of M. O. Johnston)

We do not make the swab. We don't run a swab as the witness testified, and I see no point in it. And it is entirely immaterial and I object. And besides, I object on the ground it is improper cross examination, too, because this witness has not testified to any swabbing.

The Court: There is no question pending. Put your next [119] question.

Q. By Mr. Foster: This device, Exhibit 8, is that the same device which is illustrated and described in Patent No. 1,790,424 which is—

The Court: What is the name of it?

Mr. Foster: Johnston patent.

The Court: That is Exhibit 17-Q.

Mr. Mellin: Just a minute, your Honor, and I will find it.

Mr. Foster: They are not marked here.

The Court: 17-Q for identification.

Mr. Mellin: What is the number?

Mr. Foster: 1,790,424.

Mr. Mellin: That is 17-L, your Honor. May I suggest, Mr. Foster, you take my book and fix your book up with the numbers.

Q. By Mr. Foster: You have the question?

A. No, I haven't.

Mr. Foster: Will you read the question?

(Question read.) A. No, sir.

Q. By Mr. Foster: You did make and use the device that is illustrated in the patent 17-L, did you not?

A. No, sir. I never run that device.

Q. Why not, Mr. Johnston? [120]

A. I just didn't have one of them.

(Testimony of M. O. Johnston)

The Court: You are referring now to Exhibit 17-L for identification?

Mr. Foster: Yes, your Honor.

Q. By Mr. Foster: Was it a fact that you did not consider it a sufficiently good tool to build and operate one of them?

A. Oh, yes, it was a good tool on the face of it. The only difference in the one that I ran, it was the same type of valve but was placed up above the packer.

Q. Now, you are referring to the valve which is at capital M? Is that the valve you are referring to?

A. Yes, sir.

Q. And that valve you say was placed up above the packer marked capital O and by the spring capital R?

A. Yes, sir.

Q. And otherwise it was the device—the device you made was the same as Exhibit 17-L? The device or construction was the same but the valve was placed above the packer instead of below the packer.

The Court: You are referring to the device described on Exhibit 8?

The Witness: No, sir; I am not.

The Court: With the exceptions you have noted?

The Witness: No, sir, not quite. [121]

The Court: You are talking about the device pictured on Exhibit 17-L for identification and what are you comparing that with in your testimony now?

The Witness: Comparing it with this one.

Mr. Mellin: Exhibit 8.

The Witness: Exhibit 8.

The Court: Yes.

(Testimony of M. O. Johnston)

The Witness: And in Exhibit 8 the valve in the testing tool—that testing tool is a downwardly seating valve and in Exhibit 17-L that is an upwardly seating valve. That valve was changed. I don't recall just when because we found some difficulty in the deeper holes. If we had only accumulated not a great amount of fluid inside the drill pipe that valve would kick open.

Mr. Mellin: That is referring to this one?

The Witness: Referring to the one in Exhibit 8.

The Court: The main valve.

The Witness: The main valve, yes, sir. It would kick open after we had removed our packer and exposed it to the hydrostatic head. By changing the valve in the manner of in 17-L it didn't do that. It wouldn't kick open.

The Court: It was an upward closing valve?

The Witness: Yes, sir, it was an upward closing valve.

Q. By Mr. Foster: Now, have you pointed out the upwardly closing valve on Exhibit 17-L to which you referred? [122]

A. Yes; "E" is the valve and "M" is the seat.

Q. That is in Fig. 2? A. In Figure 2, yes.

The Court: Referring to Figure 2 of Exhibit 17-L for identification?

The Witness: Yes, sir.

Q. By Mr. Foster: Now, between what periods of time did you use the sample tester like Exhibit 17-L?

A. I never used that exact construction, Mr. Foster.

Q. You modified what features of it? Tell us how you changed it?

A. The valve was put above the packer about in the same place that the main valve in Exhibit 8—about at

(Testimony of M. O. Johnston)

the same place as the main valve in Exhibit 8 is the only difference.

Q. And what was the reason for that? Is that the reason you have given?

A. Mr. Foster, I don't know. My brother did that and I never asked him why. I never made one like it.

Q. None were ever made. No testers to your knowledge were ever made like this patent, Exhibit 17-L?

A. None to my knowledge. I didn't make any, no, sir.

Q. Now, in your opinion is this tester, Exhibit 17-L, one which could be readily provided or readily combined with a gun perforator? [123]

A. Yes, sir.

Q. To be used in a combined tool such as you are using?

A. Yes, sir.

Q. Is the device in Exhibit 17-L the device which you used in designing your gun perforator in order to make the combined tool?

A. The functions were the same, practically the same.

Q. In other words, you referred to this patent and had it before you and modified it in the respects necessary when you put out your combined perforator and tester, is that right?

Mr. Mellin: Just a moment. I think you had better quote his testimony correctly. He gave no such testimony.

The Court: The question is whether he used the tester illustrated on 17-L for identification, that precise tester in making his combined tool.

Mr. Foster: Yes.

The Court: Which is the tester and the gun.

Mr. Foster: Yes.

The Witness: I did not, no, sir.

The Court: Which tester did you use?

(Testimony of M. O. Johnston)

The Witness: I used the tester with the valve placed above the packer.

The Court: Is it illustrated here? [124]

The Witness: It is in some of these patents, your Honor.

Mr. Merlin: That is the Johnston Patent 2,073,107. That is Exhibit 17-U.

The Witness: Yes, That is the testing tool that I used when I attached the gun to it.

Q. By Mr. Foster: Now, why did you discontinue the manufacture and use of the tester like Exhibit 8 in 1930?

A. Progress. As we encountered difficulties, why, we would change. We would change as we accumulated knowledge—as the wells picked up in depth and the mud got heavier. There are numerous things that would cause you to change.

Q. Isn't it a fact, Mr. Johnston, that in 1930 having due regard to the greater depth of the wells and the greater weight of the mud that was employed, this tester, Exhibit 8, no longer was suitable to meet those needs?

A. Not all the needs. It would make a test, Mr. Foster, but it was dangerous in some instances to run at great depths—would get off the shoulder.

Q. And isn't it a fact that now whenever a bottom hole test is made and a conical packer is employed down here at the top of the rat hole, they use an additional packer higher up on the string to help hold the pressure of the mud column in deep wells?

A. That is all according to the formation we are test- [125] ing in. We take a double shot at it but if the formation is good and solid we only use one packer.

(Testimony of M. O. Johnston)

Q. Now, in this device, this tester 17-L, that is lowered into the well as I understand it on tubing, isn't it?

A. Yes, sir, the same as Exhibit 8.

Q. And you referred to a bailer. A bailer could be run down into the tubing and pulled out, couldn't it, if desirable?

A. Oh, yes.

Q. While the tester is in the hole?

A. (No answer.)

Q. That is correct, isn't it?

A. While the tester is in the hole or packer? Without a tester it could be run in there.

Q. I didn't get the last.

A. I say a packer—without a tester a bailer could be run in there.

Q. Now, you testified that your brother made a change—that is, he moved the location of the valve to above the packer in Exhibit 17-L. How long did you use the modified structure of Exhibit 17-L?

A. I never used 17-L.

Q. Even as modified by your brother?

A. As modified, moving the valve up above the packer I used it. I never did see one of these tools that I know of [126] or if he ever made one I don't know.

Q. As modified, as you explained, between what periods did you use it?

A. I used it probably from 1928 to 1931.

Q. And why did you discontinue its use? Because it no longer fulfilled the needs of drilling wells at great depths with heavier mud?

A. I didn't discontinue the use of the valve structure. The valve structure has remained the same. I added some features to it for safety—an equalizing valve to relieve

(Testimony of M. O. Johnston)

the pressure—a slip valve to relieve the pressure to let it drop below the packer without entering the tubing.

The Court: A modification of Exhibit L for identification which you are referring to now?

Mr. Foster: Yes.

The Court: Is that illustrated anywhere?

Mr. Mellin: What he is doing now is in that same patent referred to a moment ago, which is Johnston Patent No. 2,073,107.

Mr. Foster: 17-U.

The Court: 17-Q as I had it for identification. He used it around 1930 in California.

Mr. Mellin: That is correct.

The Court: I was wondering if that was an illustration of the modification he is now describing. [127]

Mr. Mellin: Yes. I beg the court's pardon.

Mr. Foster: The modification you are describing is the Johnston Patent 2,073,107.

Mr. Mellin: Just a moment. I think it is 1901, isn't it, showing the addition of an equalizing valve. That would be 17-Q as for identification. He testified in that one that he built in 1930 following the teaching of 1901893, it shows an equalizing valve with the same valve structure which shows in the one to which he just referred.

Q. By Mr. Foster: Is the modification which you referred to and which you made over 17-L, illustrated in this Johnston Patent 1,901,813? A. Yes, sir.

The Court: That is Exhibit 17-Q for identification.

Mr. Foster: Yes.

Q. By Mr. Foster: Now, you mentioned in connection with some of these testers, such as Exhibit 8. that you, as I understood you, that you had observed that

(Testimony of M. O. Johnston)

they used a conical packer at the bottom of the bore hole and another packer higher up on the string for safety reasons when they were taking a test?

A. That is Exhibit 8?

Q. Exhibit 8. A. No, sir.

Q. Or Exhibit 17-L? [128]

A. I don't know what they used on 17-L. I never used that, Mr. Foster.

Q. For the modifications such as illustrated in Exhibit 17-Q.

A. Yes, sir. At times we run two packers. Sometimes we run three. It is all in the formation that we are running in.

Q. Now, is that true of your present combined perforator and tester? Sometimes you will use more than one packer?

A. Sometimes we use two packers, yes, sir.

Q. And where are they with respect to the tester?

A. The first packer is placed relatively the same as the rat hole packer on this tool.

Q. That is at the bottom of the device?

A. At the bottom of the device, yes, sir. Then a perforation in between, another casing packer and below that casing packer we screw the gun on.

Q. And then do I understand that we may have space from the bottom of the hole, one packer with the gun between the bottom of the hole and the packer and the tester above that packer where another packer with another packer above the tester? A. No, sir.

Q. I am sorry. [129]

A. We have the testing tool and the equalizing valve and then a packer screwed onto the equalizing valve. Then

(Testimony of M. O. Johnston)

our perforation and expansion joints between that packer and a lower packer. On the second packer we screw the gun.

Q. So that we have two packers supporting the column of mud in the annulus between the tubing and the casing?

A. No, sir. We only have one packer. That is what we call a straddle job where we shoot and set between the perforations because probably the lower part of the hole is open or there may be other perforations down below that that would intermingle with the test that we are trying to make. Consequently that lower packer is used as more of a plug than anything else. The upper packer is used to divide that zone and your test comes in between the two packers.

Q. Now, that lower packer, do you set that before you perforate in that zone?

A. No, sir, we shoot—we shoot the holes and then we let down and place the two packers between the holes and then we set the packer and then we commence the test.

Q. With your tool it is impossible to set the packer before operating the gun perforator, isn't it, your combined tool?

A. Yes, sir.

The Court: You are referring now to the device in suit?

Mr. Foster: Yes. [130]

Q. By Mr. Foster: The device in suit. You so understood it, didn't you?

A. Yes, sir, I understood the gun and testing—

The Court: The device now in use?

The Witness: Now in use, yes, sir.

Q. By Mr. Foster: Now, with respect to this Johnston Patent, 17-Q, I understand that you first used that

(Testimony of M. O. Johnston)

tester in 1932 or 1933 and then changed to the design of Exhibit 6, is that correct?

A. Yes, sir, that is correct.

Q. And when did you change to the design of Exhibit 6? A. 1933 or 1934.

Q. And why?

A. Well, I didn't change the design of the main valve. I changed the design of the equalizing valve.

Q. And why did you do that?

A. I beg your pardon. This is the same tool that I am using today.

Q. I am sorry.

The Court: Which tool are you referring to now?

Mr. Foster: 17-Q.

The Court: What patent number?

Mr. Foster: 1,901,813.

Q. By Mr. Foster: Is that the tool you are using now, Mr. Johnston? [131]

A. No, sir, it isn't. I see now it is. There was a modification on that later.

Q. You discontinued its use in 1933 or 1934, is that correct? A. Yes, sir; 1933, I believe.

Q. And why?

A. It is a modification of the equalizing valve. I made an equalizing valve that worked better—was more satisfactory.

Q. Isn't it a fact that the tester of 17-Q along in 1933 or 1934 was not adequate to meet the conditions of deep well drilling and heavy mud, and was not safe enough to commend it and for that reason you re-designed it?

A. No, sir; safety didn't have a thing to do with it.

(Testimony of M. O. Johnston)

Q. Well, why did you make changes in it, then?

A. This equalizing valve would work satisfactory in a casing test but running it in an open hole test under the seat would accumulate gravel and cut out so I designed a sleeve valve that didn't have any shoulder on it and it wouldn't cut out.

Q. This valve that would cut out—does that have a number on it in Exhibit 17-Q?

A. I think that is 18.

Q. No. 18 in Figure 1?

A. 17-Q, that is right. [132]

Q. Yes. And, of course, when this valve, 18, cut out that had a bad effect on the sample in the test?

A. Yes, it did.

Q. You would lose a sample?

A. Yes. Usually when they cut out we would never get a sample to start with because it cut out immediately you opened your valves.

Q. Now, the next tester which you used after this design 17-Q was this design of Plaintiff's Exhibit 6, is that correct?

A. That is correct, yes.

Q. And that is the design you are now using?

A. Yes, sir.

Q. Now, in this device of 17-Q to which you have referred here—

The Court: Q or U?

Mr. Foster: Q, the one we were last referring to, your Honor.

Q. By Mr. Foster: 17-Q. It was also possible in that device after you had secured your sample in the tubing, 35 of Figure 1, to run down with the bailer and get

(Testimony of M. O. Johnston)

some of the sample and withdraw it through the tubing. wasn't it? A. Yes, you could do that.

Q. Now, referring to Exhibit 9—I mean that was a practical operation to do if one wanted to do it? [133]

A. Yes, if one wanted to do it, yes, they could do it.

Q. Does Exhibit 9 illustrate the same sample tester as Exhibit 6? A. No, sir.

Q. When did you make that tester?

A. This tester was made between 1928 and 1930. This was the testing tool that I brought out to California.

Q. That was like Exhibit 8?

A. No. This is an upwardly seating valve and it has a trip valve in it.

Q. When did you discontinue the use of that?

A. This is the same as the tool that I am running today with the exception of the equalizing valve and the pressure bomb.

Q. But the tester illustrated in Exhibit 9 as such you discontinued the use of it when? A. 1933.

Q. And for what reason? Because your new design better met the deep well drilling conditions and the heavier mud conditions?

A. Yes, that is correct. The equalizing valve was placed in it to allow us in the deeper well to remove the packer more easily.

The Court: As long as we are going into this history I suggest you show the witness now the illustration which is [134] marked Exhibit 17-O for identification, Patent 1,842,270.

Q. By Mr. Foster: Referring to 17-O for identification when did you, or did you ever make and use that tester? A. Yes, I did.

(Testimony of M. O. Johnston)

Q. Between what dates?

A. Between 1930 and 1932 or 1933.

Q. And why did you discontinue its use?

A. For the same reason. This is a valve housing, a valve with a face on it and in running into open formation you would accumulate shale and gravel on that face—not always, but in a great many cases, and when you opened up or set your packer down and opened up your main valve instead of the top of that packer holding it from the zone above it your fluid would enter that equalizing valve and go into your drill pipe and you wouldn't get any test at all.

Q. As I understand what you are pointing at is Figure 1 of Exhibit 17-O. The valve 25, would become worn or fail to seat because of gravel, and hence when the packer was released it is that gravel—is that the gravel to which you are referring?

A. Yes. When it was once thrown open to atmosphere, why, it would, in quite a number of cases be held open and you wouldn't get anything in your test tube but your hydrostatic head or the mud fluid in your well.

Q. And so you abandoned its use? [135]

A. I abandoned it for a more practical valve, one that that wouldn't happen to.

Q. Could this tester of Exhibit 17-O for identification be readily combined with a gun perforator to provide the combined unitary tool subject to this suit?

A. Yes, sir.

(Testimony of M. O. Johnston)

Q. Would you specify all of the modifications that would have to be made in the tester of this Exhibit 17-O to provide that unit?

A. Cut a thread on the bull plug 12 and screw the gun on it.

Q. And would that be a gun like the Rembert gun to which you referred?

A. No, sir; like the gun we are now using. The Rembert gun could be adopted to this testing tool, yes, sir.

Q. With the modifications you described in connection with the Rembert gun? A. That is correct, sir.

Q. And in that connection you would run the control for the Rembert gun upwardly through the tubing 45?

A. Yes, sir.

Q. And 46?

A. And through the packer valve 38, and that is where I would pack the rod off in 38.

Q. Now, I want you to refer back for a moment to the [136] Rembert gun and particularly to Figure 5. That is Exhibit 17.

The Court: Before you leave that subject I would like to ask the witness this question: Until you began using the tester which is shown in Exhibit 17-U for identification, depicted in Patent 2,073,107, were all those testers that you devised for use in taking an open well test only?

The Witness: Yes, sir, up until December of 1930 they were all formation tests; yes, sir.

Mr. Mellin: Up until what date?

The Witness: December 1930.

(Testimony of M. O. Johnston)

The Court: You began using your tester in taking casing tests—that is through perforated holes in the casing when?

The Witness: In December—Your Honor, there wasn't—at that time we tested just the bottom of the casing instead of shooting holes in them for this water shut-off at the shoe of the lowermost joint of this casing. They would drill out below the shoe and we tested the lower part of that.

The Court: You were still using the test of the fluid from the rat hole, weren't you?

The Witness: No, sir.

The Court: When did you begin using a tester which took the fluid from perforations in the casing?

The Witness: That must have been 1934 or 1935. [137]

The Court: Testing behind perforating holes in the casing.

Mr. Foster: What hours does your Honor ordinarily take the afternoon recess?

The Court: We are going to adjourn in a few moments for the day. We will proceed for another 15 minutes.

Mr. Foster: Has your Honor completed his questions?

The Court: Yes.

Q. By Mr. Foster: I want to refer again to the Rembert Patent, 17-M, for identification, and particularly direct your attention to Figure 5 of that patent. It is my understanding, Mr. Johnston, that in order to operate this gun a weight must be dropped down on the central rod 37 against the plate 34, thus releasing the springs of the different guns and permitting them to impinge upon the firing pins 19? A. Yes, sir.

(Testimony of M. O. Johnston)

Q. And that there is no control element as such which extends up to the top of the well? In other words, it is necessary in order to fire the gun to drop a weight down the well around the rod 37 in Figure 5 there.

A. I misunderstood your question then, Mr. Foster. I thought your question was asked me how I would hook the Rembert gun to my testing tool and make a job with it.

Q. Is the understanding I have stated correct as to [138] the operation of the Rembert gun in this Patent 17-M?

A. That is the way the Rembert gun shows it, but to modify it I would have to do something else to it to make it shoot like running the rod up there. I thought that was your question.

The Court: You asked him how the device is described in the Rembert patent.

Mr. Foster: Yes.

The Witness: How it is made to shoot?

Q. By Mr. Foster: Yes.

The Court: Did you understand that?

The Witness: Yes, sir.

The Court: Not how you would tie it on to some tester, but how would you take the gun described in the Rembert patent and make it shoot?

The Witness: By dropping a weight on that rod through the drill pipe.

The Court: Rod 37?

The Witness: 34.

Mr. Foster: It is 34, isn't it, your Honor, in Figure 5? The rod is 37 and the plate is 34.

The Court: Yes.

(Testimony of M. O. Johnston)

Q. By Mr. Foster: The weight would not be dropped through the rod, would it? It would be around the rod? That is, dropped down on plate 34, is that correct? [139]

A. I suppose so. May I explain that I never ran this gun in an oil well. I only experimented on top of the well. Consequently we did not have to add tubing on this gun to fire it. We would load it and put it down and hit the top of this rod with a hammer and fire it.

The Court: Rod 37?

The Witness: Yes, sir.

Mr. Foster: No, it wasn't rod 37. You hit some other rod.

The Witness: No, not rod 37. It is rod 25, I guess.

Mr. Foster: To the left of Figure 5, your Honor.

The Court: Yes.

Q. By Mr. Foster: You were operating it in that manner because you were right at the surface of the ground? A. Yes, sir; that is correct.

Q. Now, directing your attention back to these prior or these Johnston tester patents you have referred to, for example, 17-O. How would you modify the tester apparatus there above the gun to permit you to drop the weight down to fire the gun?

A. This equalizing valve, Mr. Foster, is below the main valve.

Q. But it is above the perforator, isn't it? Isn't all the testing apparatus of Exhibit 17-O, if you put it in a combined tool, isn't it above the gun perforator? [140]

A. Yes, it would be above.

Q. Then how— A. The packer.

(Testimony of M. O. Johnston)

Q. Yes. Then how would we drop a weight down around the tubing and this sample tester in order to actuate this Rembert gun?

A. You couldn't do it if you left a small portion of that, as he intended to shoot it without a testing tool. You couldn't do it. But if I was improvising to run that with a testing tool I would extend that rod up through this, up through the packer, up through the equalizing valve, up through the circulating valve, up into the tubing which is closed off by the atmospheric pressure and drop the rod on top of it above the tester.

Q. That is the rod 25, the rod 25, the control rod 25 of Rembert?

A. Yes, sir; I have never done that but if I was asked to do it that would be the way I would do it.

Q. You would run it up through this valve 25, would you? A. Yes, sir.

Q. And you would run it up through the valve 38?

A. Yes, sir.

Q. And you would run it up through the element having the opening 37? [141] A. Yes, sir.

The Court: You are referring to Exhibit 17-O for identification?

Mr. Foster: All with respect to 17-O for identification, yes. All with respect to 17-O for identification, these numerals we have been calling out.

The Witness: Yes, sir.

Q. By Mr. Foster: And then you would run it on up to the surface of the ground eight or ten thousand feet to control the rods?

Mr. Mellin: I beg your pardon, just a moment.

(Testimony of M. O. Johnston)

The Witness: No, sir. I would stop it right here, just above your main valve.

Q. By Mr. Foster: And then how would you actuate it?

A. Drop a rod in on it and shove it down like you would hit it with a hammer on top. At the first blush that is what I would do. You asked me about it today. I never figured on putting it on there but just offhand that is what I would do.

Q. That would provide, you feel, a unitary tester and gun perforator which would have all the advantages and utility of your combined tool subject to the suit here, is that correct?

A. Yes, sir; I could put my tester on this, fire those dynamite caps by a straight rod, drop it inside my drill pipe. [142] It would fire the same as it does by shooting it hydrostatically.

Q. Now, I want you to refer to a date of December 1930 and have you identified from the Exhibits here the sample tester which you were then using? Was that Exhibit 17-O for identification?

A. I will have to confine that. It may have been a month or two later, but as to my memory it was December 1930 that I experimented with this valve.

Q. I want December 1932, Mr. Johnston.

A. 1932?

Q. Yes. What was the sample you were then using?

A. December 1932? You can probably find it better than I can. Yes, I started using this structure in 1932—this tester in 1932 or the first part of 1933.

The Court: Which tester is that?

Mr. Mellin: 17-U.

(Testimony of M. O. Johnston)

Mr. Foster: That is 2,073,107.

The Court: Which is another way of saying you were using then the tester which you are using now?

The Witness: Yes, sir; that is correct, sir.

Q. By Mr. Foster: And what was the best gun perforator known to you in December 1933?

A. It was the Rembert gun. The Rembert gun was the best known. [143]

Q. And that was the best gun known to you?

A. Known to me at that time, yes, sir.

Q. Now, you testified that you performed development work on the Johnston Gun Perforator from 1941 to 1943 and that your expense was quite a bit. Approximately how much was spent by your company in developing a gun perforator in that period?

A. Fifteen or twenty thousand dollars, I would imagine. I don't know exactly.

Q. And did it extend for approximately the full two years or three years, 1941, 42 and 43?

A. Yes, sir.

Q. When did you first see the three Collins patents which have been identified here?

The Court: Exhibit 11.

Mr. Foster: Exhibit 11, yes.

A. The patents, Mr. Foster?

Q. By Mr. Foster: Yes.

A. It was probably in 1940 or 1941. I am not sure.

Q. And you saw them, at any rate, all three of the Collins patents, Exhibit 11, before you commenced develop-

(Testimony of M. O. Johnston)

ment work upon this electrically fired gun perforator, didn't you?

A. Yes, sir; I saw some of them. I can't say all three of them or not. I am not sure. I was satisfied with [144] the patent.

Q. I do not mean to trick you but I notice here that they did not issue two of them—two of them were issued in 1942 and one of them issued in 1943, but you say the applications for those patents at any rate before you commenced the development work you have referred to, didn't you?

A. I saw something, Mr. Foster, that convinced me that the patents were alright and I signed a contract with them.

Q. Then after the patents were issued you continued to completion of this development work and continued your license with respect to the electrical gun, is that right?

A. Yes, sir. [145]

Mr. Mellin: I think counsel is putting words into the witness' mouth.

Q. By Mr. Foster: You continued your development work on an electrically firing gun after the Collins patents issued and after you had taken your license under them, as I understand it?

A. After I had taken the license under them.

Q. Is your present gun in the tool, the unitary tool here complained of, electrically firing?

A. It is not electrically fired, no, sir.

The Court: You mean the gun as now used?

Mr. Foster: The gun as now used.

The Witness: No, sir, it is not.

The Court: It is mechanically fired?

(Testimony of M. O. Johnston)

The Witness: Mechanically fired.

Q. By Mr. Foster: Have you ever used commercially an electrically firing gun perforator?

A. No, sir, I have not.

Q. Can you give us the date when you commenced using commercially your unitary combined tool of a tester and perforator? A. Commercially?

Q. Yes. A. In 1943, I believe.

Q. Can you tell us when in 1943? [146]

A. No, sir, I cannot.

Q. When you operate a gun alone, do you run the gun into and out of the casing on tubing?

A. Tubing or drill pipe we run into the casing, but not out of it if we are going to shoot the casing.

Q. When you operate the gun perforator alone without a tester, it is attached to tubing instead of a cable, is it? A. Yes, sir.

Q. Wouldn't it be much quicker to run it on cable?

A. Yes, sir.

Q. But your gun is not operable on cable, as I understand it? Is that the reason?

A. No, sir, we have never tried it that way.

Q. You don't know whether you could operate your gun perforator if it were run in on cable or not?

A. I am pretty sure it could be rigged up to operate on electrical cable.

Q. Why don't you run it in on cable, if it is faster to run it in on cable than on tubing?

A. I may do that later on.

Q. Can you give us any reason why you have not done so before? A. No, sir.

(Testimony of M. O. Johnston)

Q. When did you first see a gun perforator that was run in on tubing or drill pipe instead of on cable? [147]

A. Well, the Rembert gun was supposed to run on tubing and drill pipe. That was the way it was fitted.

Q. Wasn't it run in on solid rod, in accordance with the patent?

A. I don't know about the patent. I didn't understand it that way, but it was run on tubing.

Q. It was not necessary to run it on tubing to fire the Rembert gun, was it? It could be run on cable and fired?

A. I think you could run it on just a plain cable, yes.

Q. Why then was it run in on tubing, a more time-consuming operation, instead of on cable?

A. I don't know. I never run it either way.

Q. Did you see the Rembert tool run in on tubing or drill pipe? A. No, sir.

Q. You didn't see it run in by anyone at all?

A. No, sir.

Q. When did you first see a gun perforator that was run into a hole on cable?

A. I don't know. It was probably 1934 or '35.

Q. And who performed that operation?

A. I don't recall whether it was Lane and Wells or—I think it was the Lane and Wells Company. I am pretty sure it was.

Q. Isn't it a fact that commencing in 1934 and for [148] years thereafter you were very familiar with the operations of gun perforators by the Lane-Wells Company? A. Yes, sir, I understood how it worked.

(Testimony of M. O. Johnston)

Q. And have those perforators always been run in in on cable, or were they sometimes run in on tubing or drill pipe?

A. To my knowledge, only on cable. I don't know.

Q. When did you first see a gun perforator which was run into a well on tubing or drill pipe?

A. In 1934 or 1935. It may have been earlier. I am not quite sure of that, Mr. Foster.

Q. I perhaps have misunderstood you, Mr. Johnson. I understood you to say it was in 1934 or 1935 that you first saw a gun perforator run into a well on cable. Did you at the same time see a gun perforator run into a well on tubing, a tubing string or drill pipe?

A. No, sir.

Q. When did you first see a gun perforator run into a well on a tubing string or drill pipe?

A. In 1941 or '42, I imagine.

Q. Who performed that operation?

A. Probably we did.

Q. Is there any advantage in running a gun perforator into a well on tubing or drill pipe over running it in on cable?

A. No.

The Court: We will suspend at this time until tomorrow [149] morning at 10:00 o'clock. The trial will be recessed until tomorrow morning at 10:00 o'clock.

* * * * *

Mr. Mellin: If your Honor please, I believe there is one correction that the witness would like to make in his testimony yesterday. May we do it now?

The Court: Yes, I think it would be well.

(Testimony of M. O. Johnston)

Mr. Mellin: Do you have that, Mr. Johnston? You told me this morning there was a correction you wanted to make.

The Witness: Yes, sir.

Mr. Mellin: Will you tell us what it is, please?

The Court: You are showing the witness the transcript of yesterday's proceedings? [153]

Mr. Mellin: Yes, your Honor. And what page is it at, Mr. Johnston?

The Witness: 137.

Mr. Mellin: Where is the correction and what is it, please?

The Witness: It is in line 15.

Mr. Mellin: Will you read it as it is.

The Witness: "In December, your Honor, there wasn't—at that time we tested just the bottom of the casing instead of shooting holes in them for this water shut-off at the shoe of the lower-most joint of this casing. They would drill out below the shoe and we tested the lower part of that.

"The Court: You were still using the test of the fluid from the rate hole, weren't you?

"The Witness: No, sir.

"The Court: When did you begin using a tester which took the fluid from perforations in the casing?

"The Witness: That must have been 1934 or 1935."

Mr. Mellin: What is the correction you wish to make?

The Witness: The correction I wish to make—I had in mind at the line gun perforators and I failed to bring in [154] the mechanical perforators that had been run for years and years and that we had tested behind me-

(Testimony of M. O. Johnston)

chanical perforators ever since we had been running casing tests or casing packers in conjunction with the formation tester.

The Court: How long had that been?

The Witness: From 1930.

The Court: In other words, from the time you began testing up until about 1930 the only test you had was to drill a rat hole beyond the point where the casing extended, and take the fluid from the rat hole?

The Witness: That is correct, sir. There has been—there is another type of packer that wasn't shown which is a straight hole packer that we did test—we did test with a straight hole packer at times even.

The Court: Even that one took the fluid from the bottom of the well?

The Witness: That is correct, sir.

The Court: Now, in 1930 you began to perforate the casing either mechanically or I suppose it was mechanically at first, wasn't it?

The Witness: Yes, sir. [155]

The Court: In 1930 or around that time you began perforating the casing and taking the sample so the fluid came through the perforations in the casing?

The Witness: Yes, sir. The mechanical perforator, your Honor, had been used for years back, but I had not been testing inside of the casing until 1930, when I put a casing packer on the bottom of the tester. That was in the fall of 1930, and from that time on, why, I tested behind mechanical perforators. But mechanical perforators had been known and used for years.

The Court: Then when was the first time you began to use the gun to perforate?

(Testimony of M. O. Johnston)

The Witness: The gun to perforate the casing?

The Court: Yes.

The Witness: The first time I began that was in 1943, but the Lane and Wells Company was shooting here in California from '34, or it may have been the latter part of '33. I am not positive what date, or just when they did start shooting.

The Court: Does that cover the corrections you desire to make?

Mr. Mellin: Your Honor, I have a little additional correction, and you have a second correction, Mr. Johnston, on what page?

The Witness: There is a second correction on page 143.

Mr. Mellin: Will you tell us what that is, please? [156]

The Witness: Starting at line 19 on page 143:

"The Court: Which is another way of saying you were using then the tester which you are using now?"

"The Witness: Yes, sir; that is correct, sir.

"Q. By Mr. Foster: And what was the best gun perforator know to you in December 1933?"

"A. It was the Rembert gun. The Rembert gun was the best known."

Mr. Mellin: Do you wish to correct that?

The Witness: I wish to correct that.

Mr. Mellin: In what manner?

The Witness: That I had lost sight of the fact that I had a gun, an application in the Patent Office on an electrical shooting line gun.

The Court: At what time?

The Witness: I applied for that in 1932.

(Testimony of M. O. Johnston)

Mr. Mellin: And that application, the one you refer to, did that result in Patent Exhibit 17-T, No. 2,048,451, applied for December 19, 1932?

The Witness: Yes, sir, that is correct.

Mr. Mellin: Is that all the corrections you wish to make, Mr. Johnston?

The Witness: Yes, sir. [157]

* * * * *

Q. By Mr. Foster: This gun patent, Mr. Johnston, 17-T, to which you referred in correcting page 143 of the transcript, had you prior to December 1933 used that perforator in a well hole?

A. No, sir, I had not.

Q. So that as of December 1933 the only gun perforator which you had ever heard of being operated to perforate casing in a hole was the Rembert gun perforator, is that true?

A. No, sir. There is one other, a Romanian patent. I had forgotten about it. Or a Belgium patent that I had seen in a publication sometime in 1930.

Q. You had never seen it operate, however?

A. No, sir, I had not.

Q. Now, with respect to these mechanical perforators which you say you used your tester with—

Mr. Mellin: Just a moment.

Mr. Foster: I will withdraw the question, if you please.

Q. By Mr. Foster: You stated in correcting or making the other correction in the record that you had used your testing apparatus to make a formation test through perforators in casing which had been made by mechanical perforator? A. Yes, sir.

(Testimony of M. O. Johnston)

Q. Those mechanical perforators would not perforate through the cement around the casing, would they? [161]

A. They did; yes, sir.

Q. As well as the casing? A. Yes, sir.

Q. But in no event that you know of was the mechanical perforator used as a part of a unitary tool with a formation tester?

A. No, sir, not that I know of.

Q. You stated on your direct examination that using the combined unitary tool, comprising or including the tester and perforator, there would be saved about three hours of time over the use of the tester and perforator separately. Now, if we assume a well of about 10,000 feet depth how long would it take to run down a perforator into the well, to the bottom of the well and make the perforations and withdraw the perforator if the perforator is used alone without a tester combined with it?

A. That would depend somewhat on the weight of the mud and the condition of the hole and what—well, the condition of the casing, and how fast they would run it. But if the hole was open and it had free—it could fall freely I would imagine 35 or 40 minutes to the bottom. Maybe not that much. Maybe less.

Q. 35 or 40 minutes to get the perforator into the well?

A. Yes, sir; and that would include doing the shooting. [162]

Q. And how long to bring the perforator out of the well?

A. That would also depend on how fast you withdraw it, how many sections you were running on your line and that would determine how fast you would withdraw it.

(Testimony of M. O. Johnston)

Q. Well, can you give us an estimate of the time that would be required to withdraw it?

A. No, I couldn't. I would imagine a minimum would be 15 minutes or upwards.

Q. Now, you say dependent upon how fast you withdrew it. Couldn't we withdraw it very rapidly, in two or three minutes perhaps?

A. Oh, I don't know just how your gun mechanism works on your drum—just how fast you can withdraw it.

Q. Well, is there any factor of safety to the well that controls how rapidly the gun is withdrawn?

A. Yes, I would think so.

Q. Would you explain that to me, please?

A. Well, again it would be determined by the weight of your fluid on the inside. If you perforated a gas sand that was attempting to blow out, you hadn't weighted your mud properly or an unknown sand, if it is attempting to blow out, I imagine you would pull the gun as fast as you could.

Q. Well, do I understand by that if you have a gas formation there, if you withdraw the perforator too rapidly there is a tendency for the well to blow out. Is that it? [163]

A. Well, that too would depend on the size gun you are running, how large the casing is, how closely it fitted. If you would run it too fast and if you would pull some of the mud with the additional pressure below it you may—this is all guess work on my part because, as I stated, I have never run the line gun.

Q. But your knowledge of oil wells, from your many years experience in the fields, indicate to you that if you—that that is a factor that if you withdraw the perforator

(Testimony of M. O. Johnston)

too rapidly you could incur a risk of the well blowing out under certain circumstances, is that true?

A. That would be according to whether it was a known sand or unknown sand. A great many factors should be taken into consideration.

Q. With that qualification the answer to my question is yes, is that correct? A. I suppose so.

Q. Now, how long does it take to run the sample tester into this well of about 10,000 feet?

A. That depends on many factors, too—the shape of your rig, the fastness of your crew. But I would say a minimum of a couple of hours for 10,000 feet, or maybe an hour and a half. These fast rigs that have been put out recently I haven't had much experience on them, if any.

Q. How long does it require to take the sample and [164] withdraw that testing tool when you are using it without a gun as a part of the unitary tool?

A. Without a gun?

Q. Yes.

A. Practically the same amount.

Q. How long do you leave the tester at the bottom of the well after you have secured the sample before you commence withdrawing it?

A. After we have secured the sample?

Q. Yes. Do you withdraw the tester immediately after you have secured the sample?

A. In most cases, yes, sir.

Q. Now, how long in this 10,000-foot well, assuming the same factors which you have mentioned in your description of the time required for the separate tools, how long would be required with the unitary tool, which you are now using, to lower into the well, perforate the

(Testimony of M. O. Johnston)

casing, secure a sample, and withdraw the unitary tool to the surface of the ground?

A. That too would be determined by the explanation I made before—the fastness of the crew, the fastness of the rig, the size of the rig. But I will say a minimum of two hours and a half or three hours.

Q. In your direct examination you referred to the use by your companies of the Johnston Perforator Gun for perforat- [165] ing casing, this gun being not assembled in the unitary tool with the tester. Is that gun the same as the perforating gun which you use in your combined tool?

A. I will have to have that question over again, Mr. Foster.

The Court: Read the question.

(Question read.)

A. Yes, sir.

Q. By Mr. Foster: Also you have referred to the Johnston Tester as a Texas Company and the Johnston Oil Field Service Corporation as a Texas Company. Are they the same company?

A. Yes, they are the same company.

Q. With respect to this license agreement which has been marked Plaintiff's Exhibit 7 and which relates to the Collins patents, does the Texas Company, the Johnston Oil Field Service Corporation, pay royalties under that contract?

A. Yes, sir, they do.

Q. And does it pay royalties upon its use of gun perforators in the tool, the unitary tool combined with the tester?

A. Yes, sir.

(Testimony of M. O. Johnston)

Q. And does it pay royalties under Exhibit 7 upon gun perforators which it uses alone, uncombined with the tester? A. Yes, sir.

Q. When the Texas company—and by Texas company I [166] will mean the Johnston Oil Field Service Corporation of which you are president—when did it first use the unitary combined tool, that is including the tester and the gun perforator?

A. 1943, I believe, commercially.

Q. And in what area has it used it?

A. Over Texas, Louisiana, Arkansas and Mississippi and I believe in Oklahoma.

Q. Are the combined tools, including the tester and the gun perforator, used by the Texas company identically with such combined tools used by your company in California? A. Yes, sir.

Q. Now, with respect to the Rembert gun that you tested and the Rembert gun subject to the patent included in the book marked Plaintiff's Exhibit 17 for identification, I understood you to say that you believed it was deficient in that the mud pressure would push the bullet back into the cartridge, is that correct?

A. Yes, sir; under a high head or a head that would overcome that.

Q. Now, in the gun perforator itself which you are now employing in your combined tool, how do you prevent that? A. I have a sealing means.

Q. That sealing means is—is that between the firing chamber and the bullet? [167]

A. The sealing means is on the outside of the gun body ahead of the bullet.

(Testimony of M. O. Johnston)

Q. It is between the exterior of the tool where the rotary mud is and the bullet and the cartridge?

A. Yes, sir.

Q. And that is a rupturable sealing disc, isn't it, that can be broken when the pressure builds up in the firing chamber around the bullet?

A. It can be pushed out or ruptured, I don't know which it does.

Q. It is made of a material such that is fragile or breakable and when the gases from the explosion of the powder in the firing chamber occur it pushes the bullet out through it, that is true, isn't it?

A. No, sir; that is not true. It is made of steel.

Q. It is pierced by the bullet, isn't it?

A. It is either pierced by the bullet or pushed out.

Q. The steel disc is sealed then to enclose the firing chamber and the bullet and to protect it against hydrostatic pressures which are encountered in columns of mud ten or twelve thousand feet deep, is that true?

A. That is correct; yes, sir.

Q. And the disc will not break or give under those pressures and will not admit rotary mud into the firing chamber or into contact with the bullet or the cartridge? [168]

A. Yes, that is correct.

Q. So that a pressure equal to a hydrostatic column of ten or twelve thousand feet of mud is necessary in order to break or remove the steel disc when the cartridge explodes in the firing chamber?

A. I don't understand that question, Mr. Foster.

Q. I mean—the question is simply this: In order to break that disc or remove it so that the bullet can get

(Testimony of M. O. Johnston)

out of the firing chamber when the cartridge is exploded, it is necessary for the pressure to build up in that firing chamber so that it exceeds the hydrostatic pressure of a column of mud ten or twelve thousand feet deep?

A. I don't think that is my theory of it. To answer that question I could explain what I believe—the way I believe the gun to work.

Q. With respect to that disc?

A. Yes, with respect to the disc.

Q. Please do so. [169]

* * * * *

Q. When did you first learn of that Mims patent?

A. Sometime in 1932.

Q. Is it the perforator of this Mims patent which you combined with the tester to provide the combined tool, the [176] subject of the suit here?

A. I don't understand that. I don't know how to answer that. It is not clear.

Q. Well, in designing or making your combined tool, that is, the perforator and tester which is the subject of the suit here, did you utilize the perforator of this Mims patent which is Exhibit 17-G, for identification?

A. Did I use the Mims gun?

Q. Yes.

A. No, I didn't use the Mims gun.

Q. Did you ever use the perforator of this Mims patent?

Mr. Mellin: Your Honor please, I think he ought to explain to the witness or make the question clear as to whether he is using a gun or a method of firing the gun, the claim to the Mims patent, or the precise Mims gun disclosed.

(Testimony of M. O. Johnston)

Mr. Foster: I will clarify it.

Q. By Mr. Foster: Did you ever use a gun perforator such as illustrated and described in the Mims patent?

A. No, I never used the Mims gun.

Q. Is is your opinion that the gun perforator illustrated and described in the Mims patent is a practical tool?

A. I don't know. I haven't studied that Mims patent from that standpoint. I understand that Mims patent, or was told that the Mims patent had the method claim of shooting [177] bullets into an oil well in any way.

Q. You don't know whether the perforator there illustrated or described is operative or practical or not?

A. I don't know.

Q. What must be done, in your opinion, to combine the gun perforator illustrated and described in the Mims patent with a tester to provide a unitary tool, such as your device, the subject of the suit here? Would you like a copy of that before you?

A. Yes, it can be done.

Q. Well, what changes would have to be made in the perforator illustrated and described in Plaintiff's Exhibit 17-G to provide the combined tool?

A. The way it is shown in this patent drawing?

Q. Yes.

A. We would have to put a hook on the bottom of our perforated anchor, below the packer, thread the electrical cable up through the packer and up through the circulating valve on our tool on up into the drill pipe and then fix some kind of a conductor where you could run a line down and fire it off.

Q. Have you completed your answer?

A. I have completed it, yes, sir.

(Testimony of M. O. Johnston)

Q. You wouldn't run the electric conductor to shoot the gun up through the drill pipe or tubing to the surface of the [178] ground, and would stop it short of there; is that your answer?

A. That would be done, yes, sir.

Q. You think it a practical operation to thread an electric conductor through 10,000 feet of drill pipe or tubing as you are assembling it and lowering it into the well?

A. It can be done, but it would not be practical to do it.

Q. It is for that reason that you would stop it somewhere in or above the tester; is that right?

A. Yes, sir, because that is an easier way to do it.

Q. Now, when you were speaking of combining it with your tester, you had reference to a tester such as is illustrated and described in the patent marked Plaintiff's Exhibit 17-Y, for identification; is that correct?

A. That is a gun. That is not a tester.

Q. Oh, I am sorry. You had in mind a tester such as illustrated and described in your patent marked Plaintiff's Exhibit 17-U, for identification; is that correct?

A. Yes, sir.

Q. And that conductor I imagine could be stopped so that it was energized by contact, for example, with the lower end of the valve cage 35. Would that be a good way to do it?

A. I don't know how you would ground out or get through it. You are getting a little—my electrical knowledge [179] doesn't teach me that. I know you can take two wires leading from it, that you can do that. My electrical knowledge is limited on cables, but I suppose

(Testimony of M. O. Johnston)

that there could be an insulated conductor and this be of some material, and this be Bakelite or a non-conductor, and you can do that. I imagine an electrical engineer could figure that out.

Q. So that the record is clear, Mr. Johnston, I don't mean to go beyond your knowledge and experience, but so the record may be clear, you were pointing to the element indicated by the numeral 35 in Fig. 1 of Exhibit 17-U as being the locality where the circuit might be closed by the lowering of that valve cage in order to energize the gun; is that correct?

A. That's correct, yes, sir.

Q. Now, with respect to the Collins patents, the three Collins patents which were the subject of your license agreement, and which, for identification, are Plaintiff's Exhibit 11. You had before you, when you commenced your experimental and development work upon the perforator, you had before you the full information that is disclosed in these patents, did you not?

A. I don't know whether all of those patents or not.

Q. But I mean the subject-matter of them had been disclosed to you by Collins, so that you were acquainted with the material which is set forth in those patents before you [180] commenced your experimental work?

A. Yes, sir.

Q. Can you tell us why, with those disclosures before you, it took you three years and fifteen or twenty thousand dollars in order to develop a satisfactory gun?

A. One reason was the steel, the steel situation, that we couldn't get the proper steel that we wanted, and we had to do a lot of experimenting on different steels to get that which would hold up. That was one of the reasons.

(Testimony of M. O. Johnston)

Q. Will you give all of the reasons?

A. Well, that was the greatest reason, and the war was on and you couldn't devote all your time or attention to it.

Q. I hand you a copy of Plaintiff's Exhibit 11, containing the three Collins patents. Which of the three Collins patents illustrates and describes the gun perforator which you are using commercially in your combined tool?

The Court: He has testified that one of them does?

Mr. Foster: Well, I understood him to testify that the Collins patents illustrated and described the perforator. I will withdraw the question and lay a foundation if that is not the court's recollection.

The Court: Your question is: which, if any?

Mr. Foster: Yes, which, if any.

The Witness: The September 15, 1942—

Q. By Mr. Foster: That is patent No. 2,295,634? [181]

A. Yes, sir. It describes the bullet and the powder chamber.

Q. Does it describe the gun perforator which you use in your combined tool?

A. Yes, sir, it is practically the same.

Q. And what about the second Collins patent, 2,305,139? A. Yes, sir.

Q. Does it?

A. It describes it too, from the pictures of it.

Q. And Collins patent No. 2,307,360?

A. That is substantially the way that the gun is. I can't—it looks to me that that describes it.

Q. Now, during this three years that you did this experimental work—

(Testimony of M. O. Johnston)

Mr. Mellin: Your Honor please, it seems to me he testified it was from '41 to '43. That is not three years.

Mr. Foster: I understood him to testify earlier that his experimental work had continued for practically the three years, 1941, '42 and '43.

Q. By Mr. Foster: Is that correct?

A. Yes, sir, I think that's correct.

Q. Now, during your development work on the gun perforator which you say is described in these Collins patents, what changes did you make, giving them to us in chronological order, over the perforators disclosed in these patents in [182] order to reach the perforator which you now use?

A. This first one, of September 15, 1942, No. 2,295,634, from the drawing shows a pipe or tubing slipped over the gun body, and sealed off, which is for the purpose of sealing all the gun chambers from the hydrostatic head or from any fluid. We don't use that.

Q. You are referring to the tubing or pipe indicated by the letter C in Fig. 1 of that patent; is that correct?

A. In Figure 1, letter C, yes, sir. No, sir, that letter C is the casing. I think that represents the casing of the well. I am not sure. Yes, sir, that is the letter C.

Q. Would it be the pipe or tubing 56, then, in Fig. 1?

A. Yes, sir, that is correct.

The Court: In other words, as I understand it, this Collins patent No. 2,295,634 provided for a sealing means or in the nature of a jacket that sealed all the chambers?

The Witness: That is correct, sir.

The Court: And you changed it to individual steel disks to seal individual chambers; is that right?

The Witness: Yes, sir.

(Testimony of M. O. Johnston)

Q. By Mr. Foster: Did you experiment with a perforator having that sealed chamber, as illustrated in that patent, before you decided you would not use it?

A. No, sir, I didn't have to experiment with that. That was being used the first time I saw the Collins gun. [183] I think that was in, oh, 1938 or '39, and they were using that sealing means at the time.

Q. Why didn't you use it?

A. Well, the tubing that you sealed it with I thought probably cut down the penetration of the bullet some into the casing. Another thing, it was expensive. You had to buy Shelby tubing, a tubing that was made for it, and it cost quite a bit, where you could seal it individually with sealing disks, and that brought the expense down.

Q. Now, will you tell us in a general way what changes you made, what models you made, what departures you made from the perforators illustrated and described in the Collins patents over the three years and that involved the expenditure of this fifteen to twenty thousand dollars in reaching your present gun perforator, starting at the beginning of the three-year period? What models or experiments did you do, first? What changes did you make, next? Just tell us that story.

A. Well, at first we removed the jacket over the gun powder, and we went into sealing—trying and succeeding in sealing the mouth of the gun barrels, and where there was this crudeness, probably a refinement in the firing head. We had to do that. It was a slow thing, putting that small hole through the center of the gun body. It is a 1/16 inch hole. That is marked 13.

Q. In Fig. 1 of patent 2,295,634? [184]

A. Yes, sir.

(Testimony of M. O. Johnston)

Q. Would you continue with your story now of the development work?

A. We spent quite a bit in boring that hole and in longer sections. In a one-foot section, why, it was relatively easy to get it in, but we wanted to go into longer sections, in five-foot sections, so we spent a great deal of time and the waste of a lot of material in running off that small hole before we were satisfied that we could get it in straight, and we do that today. Sometimes we run those chambers, and most of this work in refinement was going on in Texas, and I was back and forth. Without the invoices and the time cards of the machinists, and so on, and so forth, I couldn't give you all of it. It is just roughly, and I think that is about all I am qualified to say on it. Some of the steels that we used would stretch, the barrels would get larger, or we were getting a harder steel and that steel would blow up because we could not get the type of steel at that time that we wanted. It wasn't available. [185]

Mr. Foster: Does your Honor want to recess at this time?

The Court: No, we will proceed.

You were attempting to find a substitute for the steel you wanted, is that it?

The Witness: Yes, sir; we were trying to get one that would hold up over some reasonable period. Some of the steel would stretch with one shot and you have to throw that section away and it was very expensive to do that.

Q. By Mr. Foster: Now, directing your attention to the testers which you knew of prior to December 1933, did you know of any testers for oil wells which included

(Testimony of M. O. Johnston)

a valve for retaining the sample in the testing device so that mud would not enter past the valve into the testing device?

A. I will have to have that question over.

The Court: Please read the question.

(Question read.)

The Witness: Yes, sir.

Q. By Mr. Foster: And did you know of any such valve which was operated automatically or in some manner not from the surface of the ground?

A. Yes, sir; I know of one valve that—however, not to retain a sample that could be operated from the surface of the ground.

Q. Well, I meant a valve that would retain the sample [186] in the tester and would not permit the rotary mud to pass beyond it into the tester with the sample. You knew of such a valve prior to December 1933 in a tester, didn't you, that would lock the sample in the tester against the rotary mud?

A. Yes, sir. I knew of valves that would not let the rotary mud in prior to 1933; yes, sir.

Q. Now, did you know of such a valve prior to such date which was not operated from the surface of the ground?

A. No, sir; I don't believe I do.

Q. You do not recall any?

A. I do not recall any.

Q. At this time? A. No, sir.

Mr. Foster: That concludes my cross examination.

The Court: Mr. Mellin.

(Testimony of M. O. Johnston)

Redirect Examination

By Mr. Mellin:

Q. Mr. Johnston, in correcting your testimony this morning as to the use of casing packers in connection with testers, you testified, I believe, that the first one that you employed was in December of 1930?

A. Yes; that was the first casing packer that I used that was perfected for a testing tool.

Q. I hand you what appears to be a part of the record of the Johnston Formation Testing Corporation, Limited, and [187] signed by M. O. Johnston, and ask you what that is.

A. That is one of our test tickets describing a well that I ran on the Ohio Oil Company, Well No. 4 at Venice, with 8-5/8 casing packer on December 28th.

Q. What year?

A. 1930, but I failed to put the 30 on the ticket.

Q. Can you tell by those tickets—are those tickets consecutively numbered?

A. Yes, sir.

Q. Can you tell by the tickets that precede it and follow that date—what is the ticket that precedes it?

A. The preceding ticket is another run on Well No. 8 which is a hook wall packer below the tool, gas and mud. That date is January 1st, or, rather, it is marked first, first, 31.

Q. What ticket number is that?

A. That is Ticket No. 511.

Q. And what is the ticket number that you referred to before?

A. 508.

Q. And what is the ticket number—what is the date of the ticket number ahead of 508?

A. 11-9-30.

(Testimony of M. O. Johnston)

Q. And that indicates what?

A. (No answer.) [188]

Q. November 9th, 1930? A. Yes, sir.

Q. And I notice the ticket No. 511 is signed "M. O. Johnston"? A. Yes, sir.

Q. And is that your signature? A. Yes, sir.

Q. And I notice Ticket 508 is "M. O. Johnston"?

A. Yes, sir.

Q. Is that your signature? A. Yes.

Q. And was the memorandum made on that ticket at the time or approximately the time that the test was made or not?

A. Yes, sir; it was probably made at that time.

Q. What type of packer does that ticket indicate to you? A. (No answer.)

Q. That indicates was run on the tester at that time?

A. The indication is that it was a casing packer.

Q. And is that—do I understand that to mean a packer that would be set in the well casing?

A. Yes, sir.

Q. And does it tell you what—particularly what make packer it is? A. Yes, sir. [189]

Q. What is it?

A. Well flowing through P.O.T. packer and formation tester. That "P.O.T." is the initials Pacific Oil Tool Company or corporation, I don't remember which.

Q. They were located here in Los Angeles?

A. Yes, sir.

Mr. Mellin: The tickets referred to by the witness are offered in evidence.

Mr. Foster: Do you want to offer them all, Mr. Mellin, or the ones he identified?

(Testimony of M. O. Johnston)

Mr. Mellin: I would like to offer the book and refer particularly to those tickets he referred to, as one exhibit.

Mr. Foster: We are agreeable to stipulating in order not to encumber the record, that you offer those identified. I don't see any use of offering them all—the whole book. That is the point of it.

The Court: What are the numbers of the tickets identified?

Mr. Foster: 508, 509 and 511, I think.

Mr. Harris: Also, your Honor, we would reserve an objection because we haven't had an opportunity to examine all the tickets in this book.

The Court: The offer is made of the three tickets?

Mr. Mellin: To which he referred.

The Court: Which are the tickets just stated by Mr. [190] Foster?

Mr. Mellin: Which tickets did you refer to?

The Witness: I referred to No. 506, 508 and 511.

Mr. Mellin: I offer those tickets so identified in evidence as Plaintiff's exhibits next in order.

The Court: They will be received in evidence. What is the next exhibit number, Mr. Clerk?

The Clerk: 12, your Honor.

The Court: Let ticket numbered 506 be marked Exhibit 12-A; ticket number 508 be marked 12-B, and ticket numbered 511 be marked 12-C.

(The tickets referred to were marked as Plaintiff's Exhibits 12-A to 12-C, inclusive, and the same were received in evidence.)

Q. By Mr. Mellin: Now, for how long a period of time have you been familiar with hook wall packers, Mr. Johnston? A. Beg your pardon?

(Testimony of M. O. Johnston)

Q. Over what period of years have you been familiar with hook wall packers?

A. Ever since I started to work in the oil fields.

Q. And how long have you been familiar with the use of slips to engage casing for supporting objects in well casings?

A. The same amount of time.

The Court: How long has that been?

The Witness: About 38 years. [191]

Q. By Mr. Mellin: And for how long have you been familiar with the use of bowed springs for the purpose that you discussed yesterday, for frictionally engaging the wall of a well when a tubing is lowered down?

A. The same length of time.

Q. Now, Mr. Foster asked you with respect to combining the gun of your patent, Exhibit 17-T, with your well tester. I will withdraw that.

You were asked with respect to combining the Mims gun or the gun shown in the Mims patent, No. 1,582,184, Exhibit 17-G, and I show you that patent and ask you whether or not in your opinion the cable for firing that gun, that is, the electrical cable, could be run up through a Johnston tester which you now manufacture and use, without changing the operation of the Johnston tester?

A. Yes, it could.

Q. And Mr. Foster asked you if you would run that cable up the well, up the tubing in which the tester was suspended. As a matter of fact, could or could not that be actually done, up to the well mouth up through the tubing?

A. I suppose it could be.

Q. Would you state whether or not it would be operative if you ran the cable up through the Johnston tester and out through the tubing and up the well alongside of the tubing?

A. Yes, sir. [192]

(Testimony of M. O. Johnston)

Q. And in that fashion the Mims gun would operate as specified, as shown in the patent, would it not?

A. Yes, sir; it would.

Q. And in your opinion would that gun operate in that fashion? A. Yes, sir.

Q. In conjunction with the tester?

A. Yes, sir. [193]

* * * * *

Q. By Mr. Mellin: Now, Mr. Johnston, with respect to packers. Over what period of years have packers been used on open tubing and lowered down into a well bore with the packer set between the tubing and the casing and then a swabbing action brought in or the well brought in through that tubing?

A. That has been a practice on beyond my experience.

Q. So that if it were contended at this time that it was new in 1930 to lower a hole on tubular members into a well and set a packer between that tubular member and the well for the purpose of flowing the well, would you say that within your knowledge that is old or new at the time—was old or new at that time?

A. That was old.

Q. From your practical knowledge?

A. That is old, yes, sir.

Q. Is that the function, the function of a tester such as we have been discussing, which is for the purpose of taking samples?

A. No, sir; that is not the function of a tester.

The Court: You say it is old or was it old at that time?

The Witness: Of setting packers in tubing?

The Court: Yes.

(Testimony of M. O. Johnston)

The Witness: It goes away back. [196]

Q. By Mr. Mellin: Away back? How long?

A. Oh, from the Drake well on up, the setting of packers on tubing and casing, seed bag packers, bean packers, flax seed packers, boot leg packers. That has been in practice for years.

The Court: Since what year, about?

The Witness: From my knowledge of publications I will say 1870.

Q. By Mr. Mellin: And how far back—did you ever witness the flowing in or bringing in of a well through tubing which was lowered down the well bore and then packed off between the tubing and the casing?

A. Yes, many times.

Q. How long ago would you say that you saw that first?

A. The first time that I saw it?

Q. Yes, approximately.

A. Oh, to be sure I would say 30 years ago, 35 years ago.

Q. All right. Now, with respect to drilling wells, Mr. Johnston, they spoke of always testing in a rat hole. Now, will you state whether it is usual or unusual practice to drill a well bore in which you start, say at 20 inches diameter and when you get to the bottom of the well you are down to a bore of say six inches in diameter?

A. That is common practice, yes, sir.

Q. And it steps down progressively from the largest [197] diameter through several or more stages to the smallest diameter? A. Yes, sir.

Q. And with a shoulder, an annular shoulder between the casing as those different bores are cased?

A. That has been the usual practice, yes, sir.

(Testimony of M. O. Johnston)

Q. And will you state whether or not a rat hole packer such as we know it, which is a tapered packer, is capable of being set at the upper end of one of those reduced, one of the ends of the reduced sections of the bore that is in the casing at the junction between the larger and a smaller bore case?

A. It could be, yes, sir.

Q. And will you state whether or not, Mr. Johnston, what we have been terming here the "rat hole" is actually or is not actually a part of the well bore?

A. That is a part of the well bore.

Q. Except that it is of smaller diameter than the one above it? A. Yes, sir.

Q. Now, with respect to making water shut-off tests at the bottom of a casing, Mr. Johnston, will you state whether or not it is always the practice of making such a test to penetrate the casing above the shoe?

A. No, sir; it is not. [198]

Q. What is the other practice?

A. The other practice is to clean out—well, I will explain it this way, that the practice of setting casing above the oil sand or the sand that is to be tested, is usually to set it in shale above the oil sand and that is cemented from the casing, what we call the "casing shoe," which is the extreme bottom of the casing. We put on a heavy shoe to shut off, to hold the casing, to keep it from bending and so on and so forth. We put this heavy shoe on for that purpose, an iron shoe and cement is pumped up around that shoe and then the shoe comes to rest on the shoulder and the cement allowed a certain length of time to harden. And in pumping the cement down, why, they don't pump all the cement out of the casing. They leave

(Testimony of M. O. Johnston)

some within the casing and it is required by the State Mining Bureau of California that, I think the greatest depth that you can clean out that cement, five feet under this casing shoe and then we run down with the casing packer and formation tester attached and we set somewhere in that last joint. At times the operator wants you to run the perforated anchor out of the shoe. Others don't. That is up to the operator.

And then we set this casing packer and make the test on that shoe and if the shoe is leaking, if water is coming around the bottom of that shoe it enters the testing tool and we know it. [199]

We withdraw the testing tool with the sample in it and the State Mining Bureau then gets the bottom sample or maybe on occasions they will want the top, middle or bottom. I have seen the time they would take every stand. A "stand" of pipe consists of, according to the length of the derrick, whether it is 80 foot or 100 foot. Some of the joints are 22 foot. Some of them 20, and I understand now they are up in the 30's. In fact, I think they are.

You break off those stands and as your sample comes out at the bottom, why, you catch it and if it is a very particular test, why, they will have sample jars that they catch every test or every other test in, but then the most particular tests is the bottom of that test, so we remove the tester and remove the packer off the tester and we open up the circulating valve on the bottom and the last part of that test runs into—we have a jar or bucket ready there to catch that. That is the shoe test.

Q. Now, then, shoe tests are made today both by perforation and by taking the sample just below the shoe?

A. That is correct.

(Testimony of M. O. Johnston)

Q. In both instances you set the casing?

A. Yes, sir.

Q. That is set the packer in the casing?

A. Set the packer in the casing, yes, sir.

Q. Will you state whether or not your company or its
[200] predecessor has used casing packers in connection
with the Johnston tester continuously since December
1930?

A. Yes, sir.

Q. And what other types of packers do you still use,
if any?

A. We use the straight-hole packer and the rat hole
packer and the casing packer.

Q. And the type of packer you run depends upon the
conditions you are required to meet in the bore, is that
correct?

A. That is correct.

Q. Now, Mr. Foster asked you whether or not you
knew of a valve for trapping the sample in the tubing
which was not actuated by manipulation from the surface.
Now, I will ask you whether or not the valve in all of the
Johnston testers, from 1927 to date, whether or not all
of the valves in those devices which were used to entrap
the sand in the tubing or above the tool, was a valve
which was operated to close by manipulation of the tubing
at the surface?

A. The valve that is used to entrap the sample, which
is the main valve, is opened and closed by the manipula-
tion of the tubing at the top of the well bore.

Q. And is that closing of the valve aided by means of
a spring?

A. Yes, sir. [201]

(Testimony of M. O. Johnston)

Q. And is that valve opened to admit fluid to the tubing or tools above the valve by manipulation of the tubing string at the surface?

A. Yes, sir; by letting the pressure down on this boxcar spring, that we have.

Q. And the telescoping of the parts open the valve?

A. Yes, sir.

Q. Has the Johnston company, that is the present plaintiff or its predecessors, at any time used a valve for entrapping the sample which was not operated—opened and closed by manipulation of the tubing at the surface?

A. No, sir; we have not.

Q. In other words, you haven't used any such automatic valve?

A. No, sir.

Q. That was attempted to be described to you by Mr. Foster?

A. No, sir.

Mr. Mellin: That is all.

The Court: Any further questions of Mr. Johnston?

Mr. Foster: Just two, your Honor, I think.

Recross Examination

By Mr. Foster:

Q. On your redirect examination you referred to the possibility of combining the gun perforator of the Mims [202] patent with your present tester and packer, and stated that the electrical conductor wire or cable could be run through the tubing to the surface of the ground. Now, as a practical man, with your experience in the oil fields, you would not think it practical to run 10,000 feet

(Testimony of M. O. Johnston)

of electrical cable through the well tubing or drill string when you had to thread that two miles of wire through each section of the tubing or string as you assembled it and withdraw it as you removed it, would you?

A. Mr. Foster, it certainly would not be a practical thing to do but it could be done.

Q. And it wouldn't be a practical thing, would it? And these oil wells that are 10,000 feet deep, they are usually not straight holes, are they?

A. I don't know. Some of them are. Some of them are not. They are kept relatively straight. I believe that some companies try to keep them within at least two degrees.

Q. Wouldn't you regard it likewise as impractical to run this cable down two miles for the Mims gun beside the tubing or drilling string? You wouldn't do that, would you? A. Cable down beside?

Q. Yes.

A. I wouldn't do it if there was any other way to do it, I don't think.

Q. You would not regard that as practical, either? [203]

A. I wouldn't regard it as common practice.

Q. You wouldn't? A. No.

Q. And you wouldn't regard it as practical?

A. Practical? We have, I know, in shooting dynamite and trying to loosen up tubing inside of casing,

(Testimony of M. O. Johnston)

we have run shooting lines down beside tubing to shoot that off.

Q. That was an emergency in each case?

A. Yes, sir, that was when we didn't have a cutter that would cut it off so we would do that.

Q. You referred to the fact that it was old or you had seen in December 1930 the use of a packer on tubing in flowing wells.

Mr. Mellin: He said before that.

Mr. Foster: Before December 1930, is that correct?

A. Yes, sir.

Q. By Mr. Foster: And you had observed also, hadn't you, that prior to that time the use of a bean at the top of that tubing to hold pressure on the tubing and control the rate of flow of the well fluids into and out of the tubing?

A. We usually placed the bean in what we call the "Christmas Tree". That was a series of valves leading from the tubing out. We would place beans in that—what we called "beans".

Q. And you observed that to be in very common use [204] prior to December 1930?

A. Yes, sir, we used it.

Q. And by that use of the Christmas Tree and the bean you were able to control the rate at which the well fluids entered the tubing at the bottom of the well and

(Testimony of M. O. Johnston)

the rate at which they were discharged from the top of the well? A. We would try to control it.

Q. That was the objective?

A. That was the objective.

Q. Of the beans and Christmas Tree?

A. Yes, sir.

Q. And that objective was achieved in a great many or most cases, was it not?

A. Yes; if it hadn't been we would have abandoned it.

Q. Now, in any of those flowing wells that you observed where they flowed through a tubing set in a packer in a casing, was mud introduced into the tubing in order to hold the well in and prevent the well from flowing out and pushing the well fluids out of the top of the tubing?

A. It was usual practice to run a packer, what we called a production packer that was open up into the tubing and as we let the packer and the tubing into the well the mud fluid in the well would naturally, as we let it down, why it would come into the tubing.

Q. So that that mud in the tubing acted as a cushion to [205] retard the entrance of the well fluids into the bottom of the tubing for passage upwardly therein, didn't it? A. Yes, it did retard it.

Mr. Foster: That is all.

Mr. Mellin: That is all.

The Court: You may step down.

Mr. Mellin: Mr. O'Neill.

FRANK E. O'NEILL,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Frank E. O'Neill.

Direct Examination

By Mr. Mellin:

Q. Will you give your full name, age, and residence?

A. Frank E. O'Neill. 54 years old. Residence 4218 Sutro Avenue, Los Angeles.

Q. What is your present profession or occupation?

A. I am a petroleum engineer and I am retained at this time by the Johnston Company to do research work on new devices.

Q. And what has been your formal education, Mr. O'Neill. Strike that.

By the "Johnston Company" do you mean the present [206] plaintiff? A. I do, sir.

Q. That is Johnston Oil Field Service Corporation?

A. Yes, sir. M. O. Johnston.

Q. And what has been your formal education, Mr. O'Neill?

A. I have an A. B. degree from the University of Richmond, in Virginia, and I have a B. S. degree in petroleum engineering from the University of California at Berkeley, and I attended the Colorado School of Mines in between those times, and for a short period at Cambridge University in England. [207]

Q. What has been your practical experience in the operation of sinking oil wells?

A. From the time that I graduated from the University of California, which was in May, 1920, I went

(Testimony of Frank E. O'Neill)

to the oil fields in Coalinga, California, and later into the Taft area, and later into the Los Angeles Basin area, and I have been actively engaged in the work of—

Q. In what capacity did you go into those fields?

A. In the capacity, in Coalinga as assistant to the resident engineer, that is, the resident petroleum engineer; and in the Taft area I was the resident engineer in the Elk Hills field, and I worked under the district engineer at that time; and I was the resident petroleum engineer in the Los Angeles Basin field.

Q. What companies were you associated with in those instances?

A. In Coalinga it was the Pacific Oil Company and the Fuel Oil Department of the Southern Pacific Railroad Company. They changed the name to the Southern Pacific Oil Company, and in Elk Hills I worked for the Pacific Oil Company there and then I went over to the Pan-American Petroleum Company and Petroleum Securities, the Doheny organizations. In the Los Angeles Basin I worked for the Doheny organizations and then for the Superior Oil Company in the Los Angeles field.

Q. What has been your practical experience in the [208] testing of deep oil wells?

A. Do you refer now to the use of a formation tester, or to testing in general?

Q. Both.

A. Well, as resident engineer with the oil companies it was necessary and a part of our duties to test the shut-off, the water shut-off on the walls and when we first went into the fields we did that by bailing tests or swabbing tests. The testing of wells continued that way while I was with the oil companies. Then in 1933 I went to work with the M. O. Johnston Oil Field Service

(Testimony of Frank E. O'Neill)

Corporation and tested wells by means of the formation tester while I was with them, from 1933 to 1938.

Q. What time in 1933 did you go with them and commence that work? A. In March, 1933.

Q. And it continued and was continuous through to 1938? A. To August, 1938, sir.

Q. During that time will you state whether or not you actually operated testers to remove samples from oil wells with the use of the Johnston tester?

A. Yes, sir, I did.

Q. Approximately how many wells did you actually test yourself, Mr. O'Neill?

A. Oh, I think I tested possibly 40 or 50 wells myself, [209] and I supervised the work on a thousand or more of them.

Q. Now, will you state whether or not you have had any actual mechanical experience in constructing tools of the general character we are talking about, oil well tools?

A. Well, I have had to do with the construction of mechanical tools from the days of my engineering education on through until the present time from time to time.

Q. Will you state whether or not you performed any research work in connection with the use of a fluid stream under high velocity to penetrate casing or cut steel?

A. Yes, sir, I spent several years experimenting with jets of mud fluid directed through nozzles to impinge against metal, to cut the metal.

Q. At that time did you or someone else do the designing of the different tools which you did work with?

A. Oh, I did the designing of my tools.

(Testimony of Frank E. O'Neill)

Q. And was the work of making them done under your direction or not?

A. Under my direction, yes, sir.

Q. In referring to the testing of deep oil wells, and by use of the Johnston tester, generally what type of tests did you have reference to?

A. Well, your tests are generally divided into tests made in casing and tests made in formation. The casing tests comprise a test of shut-off, for the effectiveness of shut-off, [210] and frequently tests for the productivity of formation that has been opened up through the casing by perforating of one means or another.

The Court: By "shut-off" you refer to water shut-off?

The Witness: Yes, sir, the effectiveness of the cement in excluding the water.

Q. By Mr. Mellin: In those types of tests will you state whether or not it is the object of the test to entrap an uncontaminated sample of fluid in the bore and remove it to the surface for recovery?

A. It is, sir.

Q. Then with respect to the Johnston tools which you operated, the object of those tests was not to obtain a flow or a production test?

A. That wasn't the object of it. The test was to determine whether the well—what it would produce, and we would take the test as it came. If it flowed, all right, If it didn't, we took a sample anyway.

Q. What normally is the condition of the well bore at the time a casing water shut-off test is to be made?

A. Well, the well bore at the time a water shut-off test is to be made has casing in the well bore and the well is sometimes full of drilling fluid.

(Testimony of Frank E. O'Neill)

Q. Approximately what is the consistency of that drilling fluid? [211]

A. Well, it varies a great deal. I think an average figure would possibly be 80 pounds per cubic foot as against 64 and a fraction—no, 62 and a fraction for water.

Q. What is the purpose of maintaining the casing of the well bore full of mud, Mr. O'Neill?

A. The purpose is twofold. First, to prevent any possible collapse of the casing or of the walls of the well, for that matter, and, next, to prevent the pressure within the formations in the well being able to blow out and cause a destruction of equipment and loss of the well.

Q. It is the weight of this mud fluid which overcomes the pressure in the formation and holds it back?

A. Yes, sir.

Q. Now, what is the purpose of a water shut-off test in a casing, and why is it necessary?

A. Casing is run into the well for the primary purpose, so far as the water stream is concerned, to exclude from the productive horizons any water that may have been penetrated by the hole above the productive zones, and in order to do that, when the casing is lowered into what would be a reasonably substantially impervious body, preferably a shale below the last water which lies adjacent or near the oil sand, cement is pumped down through the interior of the casing. It goes out of the bottom of the casing and up the outside, between the casing and the walls of the well, and normally [212] there is some cement left in the bottom of the casing. That is permitted to stand until the cement properly sets. At that time the Division of Oil and Gas for the State of California re-

(Testimony of Frank E. O'Neill)

quires that the operator demonstrate the effectiveness of that cement in excluding the waters above the shoe of the casing from having access to the formations below the shoe of the casing. And by the shoe of the casing, I mean the bottom end of the casing.

The Court: And that is before the well is brought in?

The Witness: Yes, sir.

Q. By Mr. Mellin: Briefly, how do you determine the effectiveness of the water shut-off test with a tool such as the Johnston testing tool?

A. There are two ways. First, the cement may be drilled out and will be drilled out to close to the shoe, and if we are going to test the entrance of water around the shoe, between the wall of the hole and the shoe, then the cement would be drilled on out to a distance, and the formation opened up possibly five feet below the shoe. In that instance the Johnston formation tester would be run in with the casing packer on it and set in the shoe joint, and the packer would exclude the hydrostatic head from having access to the test, and the tool opened up, and if there is a leak, the water entering the hole would enter between the wall of the well and the shoe joint and be picked up into the testing tool, [213] if there is any pressure on it at all. If it is dry, what we call a dry test—in other words, if the water is effectively excluded—there would probably be a few feet of mud come up into the tool, due to the pressure of setting the packing down on it, and that would be all.

Now, in the other instance the casing is perforated with bullets above the shoe, and the tester is set above the perforations—the packer is set above the operations and the same operation is performed. If the bullets in penetrating the pipe pass through the cement and the

(Testimony of Frank E. O'Neill)

cement has not been effective in preventing the water from traveling down between the pipe and the walls of the hole, then the water would have access to the pipe beneath the packer through the holes, and again the formation tester would pick up a sample of it.

If the cement has been effective in excluding the water when the tool is opened against the shot holes there would be a little mud taken into the tool, as before, because the packer is pressing down on the mud. There is a little extra pressure on the mud below due to the squeeze of the packer, and you get a few feet of mud fluid, and that would be all. That would be considered a dry test.

The Court: This cement that you pump in through the casing is supposed to be extruded out the bottom end of the casing and to be forced up between the casing and the core of the well? [214]

The Witness: The wall.

The Court: For a number of feet?

The Witness: Yes, sir, sometimes for a great many feet.

The Court: How many would that be, a great many?

The Witness: Well, they try to cement at times back to 1,000 or 1,500 feet up the walls of the well. The cement is pumped out of the bottom of the pipe. In other words, the cement is pumped into the top of the casing, and usually some of the mud fluid is pumped in, and they use the mud fluid to pump the cement into place, and it is pumped out at the bottom through the holes in the bottom of the shoe.

The Court: And forced up around the sides of the casings?

The Witness: Yes, sir.

(Testimony of Frank E. O'Neill)

The Court: And a perforation, say, 15 to 30 feet above the shoe, that would permit water to enter the casing would be considered an unsuccessful cementing job?

The Witness: Yes, sir. Now, we sometimes have difficulty in obtaining a thick enough bed of shale so that we can afford to take a chance and perforate 15 or 30 feet above. We might be above or below and shoot into a water hole that is set above the shale. But normally it is set in a shale formation or in an impervious body, and we like to have 10 or 15 feet, or more, if we can get it.

The Court: The purpose of the test is either to take the fluid from around the point where the shoe is or [215] immediately about it; is that right?

The Witness: Yes, sir. So if anything—in other words, if it will leak down the outside it will probably leak into the perforations, which not often happens.

Q. By Mr. Mellin: Mr. O'Neill, when a perforating gun is run into a well bore which is substantially full of mud and drilling fluid, and the casing is perforated through the cement, if it is cemented, does any fluid enter the well bore through the perforation at that time, with the members of the full hydrostatic head on the perforations?

A. Well, if the proper weight of mud is carried, the formation fluid should not enter because it has to enter against the pressure of the hydrostatic head, and if the hydrostatic head of the fluid is less than the pressure in the formation, the well would blow out.

Q. In other words, the normal condition is, when a casing is perforated before taking the water shut-off test,

(Testimony of Frank E. O'Neill)

that there may be no formation fluid entering into the well bore until the weight of the hydrostatic head is reduced to below the formation pressure?

A. That is correct, sir, until it is reduced to below the formation pressure.

Q. Now, in taking a water shut-off test, Mr. O'Neill, if the drilling fluid or mud in the bore gains entrance to the tubing or sample container in an unknown amount in the [216] test, is the test considered a successful test or a failure?

Mr. Foster: That is objected to as indefinite. Considered by whom?

Mr. Mellin: Well, considered by this witness.

Mr. Foster: And it calls for a conclusion of the witness.

The Court: In his opinion, are you asking?

Mr. Mellin: Yes.

The Court: Overruled.

The Witness: It wouldn't be considered a successful test.

Mr. Foster: I don't think that is responsive to the question. I think the question was as to his opinion.

The Court: Is that your opinion?

The Witness: It is my opinion, sir.

Mr. Foster: I ask his other answer be stricken.

The Court: It may be stricken.

Q. By Mr. Mellin: Will you state why, Mr. O'Neill?

A. Well, if we have taken our test fluid into the test chamber, and while we may have some idea whether we have taken in a lot of it or not by the action of the air leaving the pipe at the surface, we don't know really how much fluid we have in the pipe. Then when we turn an-

(Testimony of Frank E. O'Neill)

other unknown account of fluid into the pipe behind it, you have no measurements to go on. You don't know what you have. [217]

Q. Are you familiar with the construction and operation of the Johnston tester which is now employed by the plaintiff here? A. I am, sir.

Q. Will you state the similarities, if any, or the differences, if any, between the Johnston tester now employed by the plaintiff and that employed by Johnston or the plaintiff in 1933 to 1938, as run by you and as supervised by you?

A. They are substantially the same, sir.

Q. What do you mean by "substantially the same?" Would you state whether or not there are any differences in operation?

A. There are no differences in operation.

Q. Is there any difference in the principle of function of the different parts. A. No, sir.

Q. What were the differences, if there were any?

The Court: You mean, what are the differences?

Mr. Mellin: Yes. Pardon me.

The Witness: Well, you covered the period from 1933 to 1938.

Q. By Mr. Mellin: I mean, is there any difference, Mr. O'Neill, in construction between the tool which you operated in 1933, the Johnston tool, and the Johnston tool of today, the Johnston tester? [218]

A. The main valve mandrel has been machined with splines on it purely as a matter of safety, in case the valve had broken off.

Q. Well, to save time, the differences were minor differences in construction?

A. Yes, minor differences.

Mr. Foster: That is objected to as calling for a conclusion as to what is minor.

The Court: I will permit it, and you may cross-examine him on it, what he means, if you desire.

Q. By Mr. Mellin: Was there any difference at all in the function or mode of operation of the tool?

A. None at all.

Q. Now, you are familiar with the patents which I hand you—

The Court: It is now two minutes to twelve. You are opening up a lengthy subject, I take it?

Mr. Mellin: Yes, your Honor.

The Court: We will suspend at this time until 1:30 this afternoon. You may step down.

The Witness: Thank you.

The Court: We will recess until 1:30 this afternoon.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 1:30 o'clock p. m. of the same day.) [219]

Los Angeles, California

Wednesday, July 16, 1947.

1:30 P. M.

The Court: You may proceed.

Mr. Mellin: If the court please, at this time I would like to make the statement that in the answers to plaintiff's interrogatories, defendant set out in an answer that they would contend that claims 7, 8, 9, 11, 12, 13 and 14 of Letters Patent 2,029,491 only would be alleged to be infringed by or contended to be infringed by them and claims 5, 7—

The Court: By plaintiff you mean? Contend to be infringed by plaintiff?

Mr. Mellin: Yes, and they would be the only claims in issue here either under the complaint and answer and counter complaint and answer. And claims 5, 7, 9, 10, 13, 14, 15 and 18 of Spencer Letters Patent 2,092,337.

I would like to just have the defendant stipulate that that is the only claims they will contend are infringed here so we can confine our testimony to those claims.

Mr. Foster: Your Honor, we answered interrogatories as we were then advised as to the construction and operation of the plaintiff's tool. We haven't heard that yet.

I think the answer should stand to our then state of knowledge of the plaintiff's tool.

The Court: Have you learned any more about it since the trial opened? [220]

Mr. Foster: No, sir. I say that without any mental reservation. We have no intention now of relying on any claims other than those specified. The great probability is that we will not but until we have some sworn testimony as to the nature of the plaintiff's tool—you see the only

thing that we have inquired about is the general arrangement of the tester and the gun and this disc at the cartridge point of exit which we questioned Mr. Johnston about, but as to the details of that construction no evidence is in as to that.

The Court: Weren't you furnished with a drawing and a description of the operation of the tool?

Mr. Foster: Yes.

The Court: After the pre-trial hearing?

Mr. Foster: Yes; that was attached to their interrogatories, but there was no sworn statement that that was the only tool or the tool that—

The Court: Is that the tool you represented?

Mr. Mellin: Precisely.

Mr. Foster: It was on that showing we specified those claims.

The Court: Mr. Mellin, doesn't the plaintiff represent now that that drawing correctly depicts the tool and description of its operation?

Mr. Mellin: And the description attached accurately [221] describes the operation of the tool.

The Court: Upon that statement are you prepared to rest upon your answers to the interrogatories as to the claims in the Lane and Spencer patents on which you rely?

Mr. Foster: If we may have the additional statement of counsel that that is the only combined tool made, used or sold by the defendant within six years prior to the filing of the complaint.

Mr. Mellin: Those are the only tools that we make, use or sell other than—within six years? That would be it, your Honor, the only tool or tools.

Mr. Foster: It is my recollection that Mr. Johnston testified that there had been used and he thought commercially to the extent of his company being paid for it, a tool having a different kind of sealing means with respect to the cartridge. It is that that I had in mind when I made that reservation. I am perfectly willing to say that we will rely as to the device which is illustrated in the drawings attached to the complaint—attached to plaintiff's interrogatories, we will rely upon the claims Mr. Mellin has specified and only those claims, but I do not feel that I should be foreclosed if the evidence later develops that there is a modified form, as, for example, the form to which Mr. Johnston testified this morning, from relying upon other claims or other patents. [222]

Mr. Mellin: In other patents?

Mr. Foster: I said or other patents.

The Court: Do you have a copy of the drawings and a description of the operation of the plaintiff's tool which you expect to offer in evidence?

Mr. Mellin: Yes, your Honor, but I will be willing to do this. I will be willing to go on through this. I will repeat my request after I go through with this witness on the operation of the present Johnston tools.

The Court: Very well.

Mr. Mellin: Mr. O'Neill, will you take the stand?

FRANK E. O'NEILL,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Mellin:

Q. Mr. O'Neill, are you able to take patents that are directed to tools in the well drilling art and from their descriptions and drawing understand and explain the construction and operation of the devices therein disclosed?

A. I am, sir.

Q. Now, I hand you a book of patents which is in evidence here as Exhibit 17, and I will ask you if you are familiar—if you have read those patents and are familiar [223] with the construction and operation of the tools disclosed in each of them? A. Yes, sir [224]

Q. Now, will you turn to the Johnston patent, Exhibit 17-U, Johnston patent No. 2,073,107, and tell me if the disclosure of that patent discloses the Johnston tester substantially as it was constructed in 1933, to your knowledge? A. Yes, sir.

Mr. Foster: That is objected to. Just a moment. I move to strike the answer. It is objected to, your Honor, on the grounds that this witness has not been shown to be qualified to answer that question. He has stated only that he is able to read and tell what is disclosed in patents, and his conclusion that he is able to do so I don't think is a sufficient qualification to answer the question.

The Court: The motion is granted. Lay a further foundation as to his qualifications.

Mr. Mellin: Do I understand that in ruling that way it is based on the fact that he is not qualified to read and understand the letters patent? Because if that is the ruling,

(Testimony of Frank E. O'Neill)

I think that is erroneous, because patents are directed to those skilled in the art to which the patents apply and I think Mr. O'Neill has been shown to be skilled in the well-building art.

The Court: He may be skilled in the art, but he may not be skilled in the art of reading and interpreting these patents.

Mr. Mellin: I asked, your Honor, if he was capable. [225]

The Court: Has he studied these patents?

Mr. Mellin: Yes, he has answered that already.

The Court: I didn't understand that he has answered that?

Q. By Mr. Mellin: I will ask you again, Mr. O'Neill, have you read and studied these patents, which I have handed you, in Exhibit 17, which are Exhibits 17-A to 17-W, inclusive? A. Yes, sir.

Q. Do you understand from the drawings and the descriptions of each of those patents how the devices disclosed therein and described in those patents are constructed and operate? A. Yes, sir.

Q. And what they are intended to accomplish?

A. Yes, sir.

Q. Now, will you turn to the Johnston patent, No. 2,073,107, Exhibit 17-U. Do you understand the construction and operation of the device therein disclosed and described? A. Yes, sir.

Q. Will you tell me the differences, if any, and the similarities, if any, between the tester tool there disclosed and the Johnston tester, which you testified you operated commencing in March, 1933? [226]

(Testimony of Frank E. O'Neill)

The Court: Do you want him to tell the similarities?

Mr. Mellin: If any; and the differences, if any. I put that question that way to overcome the objection of being leading, your Honor.

The Witness: The tool is almost identical. I would say identical with the tools that I operated from 1933 on to 1938.

Q. By Mr. Mellin: Would you state whether or not it is identical in function?

A. It is identical in function, definitely.

Q. Will you state whether or not it is identical in purpose or result? A. It is, definitely, sir.

Q. Are there any particular mechanical changes which you note, other than structural changes of certain parts?

A. No, sir.

Q. Now, you have stated that you are familiar with the construction and operation of the Johnston tester which is being used today by the plaintiff. [228]

A. Yes, sir.

Q. Now, do you have with you any charts or models disclosing the well tester which is employed by the plaintiff today, and which you testified is identical with the well tester you operated from March, 1933 to 1938?

A. Yes, sir.

Q. Will you produce them?

This chart which is on the easel, is that the chart to which you referred? A. It is, sir.

Mr. Mellin: May I have the chart marked for identification?

The Court: First you asked this witness to produce some device, did you not?

Mr. Mellin: Yes, your Honor, and a chart.

(Testimony of Frank E. O'Neill)

The Court: The device, I take it, has now been produced?

Mr. Mellin: Yes, your Honor.

The Court: It should be marked, then, first.

Mr. Mellin: May I have that marked for identification as Plaintiff's Exhibit 14?

The Court: Exhibit 14, for identification, will be—will you tell us what it is?

The Witness: It is a model of the Johnston formation tester, sir.

The Court: Now in use? [229]

The Witness: Now in use, yes, sir.

Q. By Mr. Mellin: And the chart, Mr. O'Neill?

A. It is a diagrammatic drawing of the Johnston formation tester now in use, with the valves in the various positions in which they would be found as the test proceeds.

Q. Does it accurately disclose the mode of operation of the Johnston tester, as of today? A. It does, sir.

Mr. Mellin: May I have that marked for identification as Plaintiff's Exhibit 15?

The Court: Is there a 13?

Mr. Mellin: 13—I beg your pardon. May I have the tester marked 13 and the enlarged chart as 14?

The Court: The model of the Johnston tester that is now in use will be marked Plaintiff's Exhibit 13, for identification.

Then is that a single chart there?

Mr. Mellin: Yes, your Honor, it is.

The Court: And the chart on the easel which the witness has referred to will be marked as Plaintiff's Exhibit 14, for identification.

(Testimony of Frank E. O'Neill)

(The model and the chart referred to were marked Plaintiff's Exhibits 13 and 14, respectively, for identification.)

Q. By Mr. Mellin: Now, Mr. O'Neill, from the chart [230] and from the model will you please describe to us, as briefly as you can, the construction and operation of the Johnston tester and its mode of operation in performing a test?

A. May I have that read back to me, please?

Mr. Mellin: May the witness step to the chart?

The Court: Yes.

The Witness: May I have that question?

The Court: Counsel wishes you, as I understand it,—you may proceed to the chart—

The Witness: Thank you.

The Court: —to make use of Exhibit 13, for identification, the model, and Exhibit 14, for identification, the chart, and explain the mode of operation of the tester. Is that it?

Mr. Mellin: Yes, your Honor.

Q. By Mr. Mellin: And, Mr. O'Neill, is the model, Plaintiff's Exhibit 13, for identification, constructed in precise accordance, except on a smaller scale, with the Johnston tester as it is run today?

A. It is, sir. It is a quarter scale, I think, to a four-inch tool, as I recall, a quarter scale.

Q. Will you tell us now what the various figures on the chart, Plaintiff's Exhibit 14, for identification, indicate or illustrate?

A. If I may say one thing first about that patent there. The patent does not show the pressure recorder,

(Testimony of Frank E. O'Neill)

but [231] the model and the chart show the pressure recorder, and the pressure recorder is being run today, but it isn't shown in that patent.

The Court: By "that patent" you are referring to—

The Witness: The last number that was called off to me. If I may—

The Court: Exhibit 17-U, for identification?

The Witness: 17-U, for identification, sir.

Mr. Mellin: 17-U, for identification. [232]

The Court: Will you try to keep your voice up, Mr. O'Neill, so we can all hear?

The Witness: Yes, sir. We have the Johnston device diagrammatically shown on the left of the figure marked 1 at the top in the condition in which the device would be run into the well.

The Court: That is upon insertion into the well?

The Witness: Yes, sir, for the purpose of going into the depth at which we wish to make the test. The device is composed—

Mr. Mellin: Just a moment, I will get you a pointer. Mr. O'Neill.

The Court: Before you proceed in detail, why don't you tell us what Nos. 2, 3 and 4 indicate?

The Witness: I will, sir. In Figure No. 1 on the left, as I said, these valves are in the position that they would normally be in in being run into the hole.

Now, in Figure 2 the device is shown in the position in which we would find it when the packer had been set for the purpose of excluding this hydrostatic head above it, from the zone below it, which is the zone to be tested.

The Court: That is just before you admit the fluid for the test?

(Testimony of Frank E. O'Neill)

The Witness: Yes, just prior to admitting the fluid for the test. [233]

In No. 3 we find the tester in the same position as No. 2, with the exception that the trip valve, which I will describe and which is a valve that finally admits fluid to the chamber, has been opened and the test has commenced.

The fluid has access now to the receiving chamber.

In No. 4 we find the device in the position in which we would have it when the tools were being withdrawn from the well after the conclusion of the test with a sample trapped in the drill pipe or the tubing.

The testing device is composed of a series of valves; a packer, a perforated anchor.

Mr. Mellin: Now, that perforated anchor, Mr. O'Neill, is merely a piece of perforated tubing, is it not?

The Witness: It is merely a piece of perforated tubing and the perforations are for the purpose of allowing the fluid to enter the tool and further for screening out any particles of shale or rock that might possibly plug some of the smaller passages within the tube.

Mr. Foster: Your Honor, I feel that this line of examination is objectionable in that it is redundant and unnecessarily encumbering the record since it relates only to the tester apparatus, which has already been covered by the testimony of Mr. Johnston with respect to his patents. This is not the combined tool subject to the suit.

The Court: This is an attempt, I take it, to educate the [234] court as to how the device operates, the tester?

Mr. Foster: But it isn't a tester that we are complaining of.

The Court: You are complaining of both of them?

(Testimony of Frank E. O'Neill)

Mr. Foster: Yes, that is true, in combination, but this chart here illustrates, as I understand it, only the tester.

The Court: I assume we will get the perforator later. Objection overruled.

I understand the fluid that goes into the tester has to go through the perforated anchor?

The Witness: Yes, sir.

The Court: It is sort of a sieve that separates the fluid from any large particles of shale or rock or whatever might be inclined to enter other than the fluid?

The Witness: That is correct, sir, because if particles, if large particles went in, some of the openings in the tool are quite small and they would plug the tool and the test would be ruined.

Below the perforated anchor we have the pressure recorder.

Now, the function of these different valves: The trip valve is a downwardly seating valve which is adapted to be locked, closed, and which may be opened at a later time when it is desirable to let the fluid into the upper or the receiving chamber. [235]

The main valve, so marked, is an upwardly seating valve. It is attached to the valve itself a mandrel passing upwardly through a housing and through this helical spring, which is interposed between the upper portion and the lower portion of the valve which two portions are telescopic with relation to each other and the helical spring keeps those two parts in a contracted position or in a closed position where the valve is held against its seat by the spring pressure.

(Testimony of Frank E. O'Neill)

The Court: All of that is illustrated in Figure 1 on Exhibit 14, the chart?

The Witness: Yes, sir; that is in Figure 1. The next item in the tool is an equalizing valve. I might say the purpose now of this main valve, however, is to trap the sample in the pipe after it has passed upward above the main valve.

The equalizing valve is also a telescoping type of valve of the sleeve type.

In the mandrel, which is tubular and passes through the interior of the housing, you might say, actually there are ports and in the housing there are ports which are adapted to be pulled into registry when the valve is in the expanded condition or position and which are adapted to be separated by packing when the valve is in a collapsed position.

The purpose of the equalizing valve is, primarily, to permit fluid when the valve is in its expanded position, to [236] permit fluid to pass through the ports in the housing and through the ports in the mandrel, which are in registry in that position, with the ports in the housing, and downwardly through the packer mandrel to be discharged through the perforated anchor beneath the packer in order to equalize the hydrostatic pressure above the packer and below the packer at the conclusion of the test, so that the packer may be released without having to pull against a differential pressure.

Q. By Mr. Mellin: By "differential pressure," Mr. O'Neill, you mean the pressure above the packer is very

(Testimony of Frank E. O'Neill)

much greater than the pressure below the packer under all normal circumstances?

A. Yes, under many tests—most tests. In fact, under normal circumstances, sir, it would.

The perforated anchor I have described—

Q. What about the by-pass valve in the packer, Mr. O'Neill? A. I don't believe I described the packer.

The next item would be the packer. The packer again employs a telescopic member. Between the telescoping parts there has been interposed some resilient material like rubber or canvas or any material that can be compressed and expanded laterally, with the idea that by letting the weight down onto the packer, when the packer has been supported from [237] below by means of slips which are provided for the purpose of biting into the steel casing and taking the load, that the telescoping member will expand—actually the telescoping retracts and the resilient member expands horizontally and pressed against the pipe with the idea of packing off the annulus between the body of the tool and the interior walls of the casing.

In the top of the packer there is a valve marked "by-pass valve" on the chart. That valve is for the purpose of permitting fluid to pass up between the sleeve, which carries the resilient member, and the mandrel of the packer, and pass out through that valve while the tool is being lowered into the hole so as to avoid a piston effect by the packer, because this casing packer fits the casing within $\frac{3}{8}$ ths of an inch normally of the diameter of the interior of the casing, so that leaves only about $\frac{3}{16}$ ths of an inch all the way around by which fluid could pass the packer as the packer was being low-

(Testimony of Frank E. O'Neill)

ered, unless there were by-passes provided. The by-pass valve has been provided for that purpose.

The casing packer could be visualized a little better by this model. These members here—

Q. You are pointing to the slips? A. Yes, sir.

Q. And you are referring to Plaintiff's Exhibit 13 for [238] identifications?

A. Yes, sir. These corrugated steel pieces known as slips, suspended by the slip rings from an anchor, are prevented from opening up until such a time as the pipe is turned in the hole to the left, turning a locking lug out of a jay slot and permitting that locking lug to drop down into a vertical slot.

These springs on the packer, referred to as "bow" springs are for friction purposes and when the tubing above and this entire device is run in on a string of tubing or a string of drillpipe, is rotated at the surface. the entire pipe and the entire tool, and the mandrel is rotated except the member held by the friction springs and that is held from rotation so that the packer may be set and then when the weight is lowered down onto the tool, the bowl of the packer, which is the member that fits inside the slips and which has several tapered surfaces, one for each slip, lowers in between the slips and the slips are pressed outwardly to grip the pipe in a form of friction or actually a biting of the pipe.

That, then, is the device by which the weight is supported when additional load is lowered to open the valves, the main valve, and to close the by-pass valve and close the equalizing valve. So in a casing packer the load is supported on these metal supports.

No. 11965

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LANE-WELLS COMPANY, a corporation,

Appellant,

vs.

M. O. JOHNSTON OIL FIELD SERVICE CORPO-
RATION,

Appellee.

M. O. JOHNSTON OIL FIELD SERVICE CORPO-
RATION,

Appellant,

vs.

LANE-WELLS COMPANY, a corporation,

Appellee.

TRANSCRIPT OF RECORD

(In 3 Volumes)

VOLUME II

(Pages 225 to 478, Inclusive)

Appeals From the District Court of the United States
for the Southern District of California,

Central Division

FEB 9 1949

No. 11965nd

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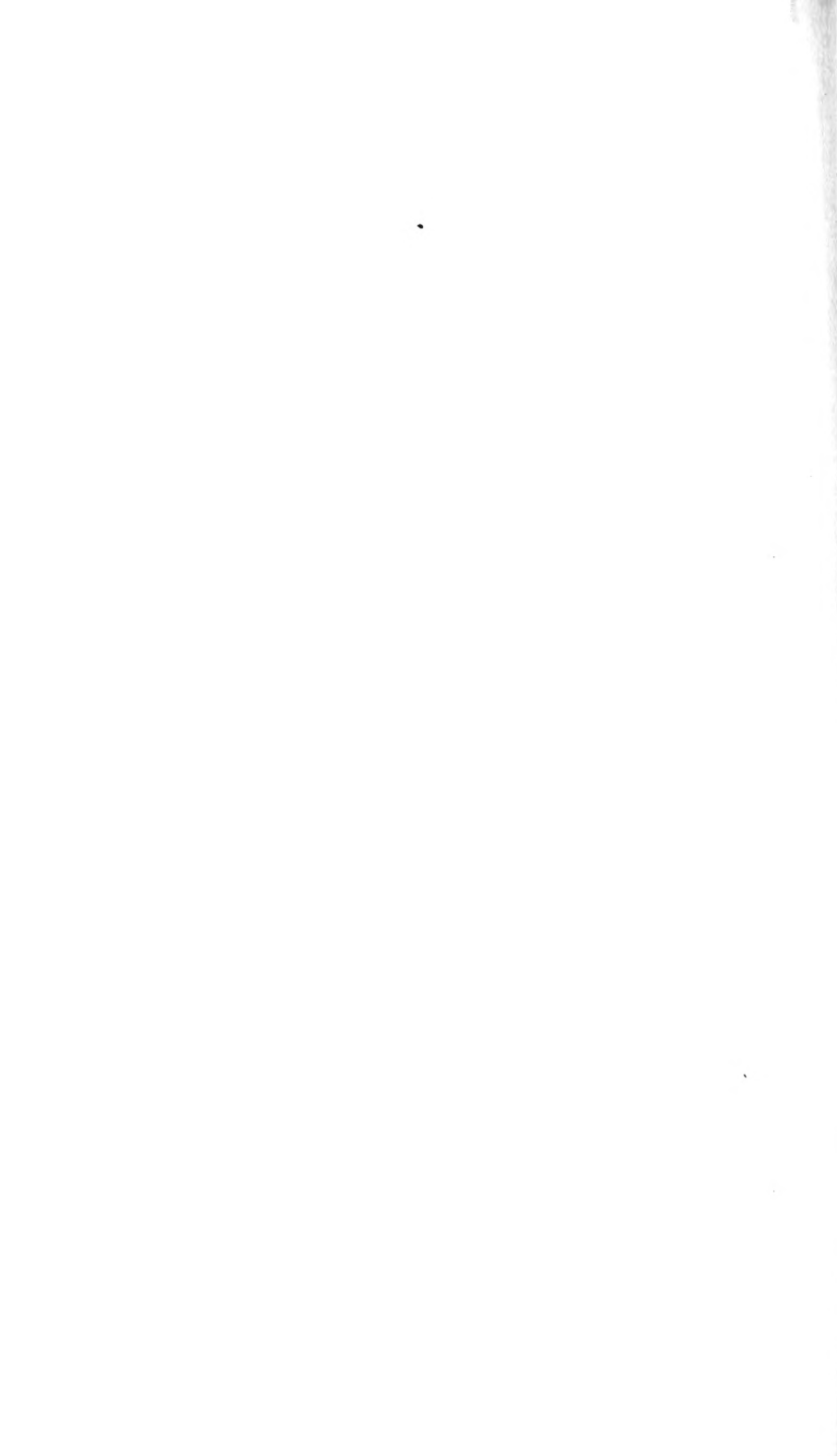
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(Testimony of Frank E. O'Neill)

Q. Now, in the case of a formation packer, Mr. O'Neill, [239] the weight of the load is borne directly by the packer itself on the shoulder?

A. That is in the case of a cone type of formation packer. There is another type of formation packer.

Q. Go on, I didn't mean to interrupt you.

A. —which is known as a straight-wall packer. It is merely a rubber sleeve, rather thick sleeve with a mandrel through it and the mandrel telescopes into a tube above and the rubber sleeve is held between, you might say, between two plates and that type of packer requires an anchor or support from the packer to the bottom of the well, and that is set on the bottom and then the pipe is lowered down and the rubber is expanded between the telescoping members laterally to pack off against the bore of the well in formation.

That packer could be used in casing but it is more convenient to use the hook wall type of by-pass packer which we have shown here.

Q. Now, with the device lowered down into the well, Mr. O'Neill, as I understand it, at that time the trip valve is closed and the main valve is closed, and the by-pass or the equalizing valve is closed and the by-pass valve is open so that—

A. That is correct.

Q. So the tool is then in that condition lowered into [240] the well until the packer has reached the point at which it is desired to test—that is, you desire to test in the zone below the packer.

Now, does that packer divide the well bore into an upper and lower zone? A. It does, sir.

Q. All right. Now, if you have reached the point of test will you refer to the next figure, that is Figure 2

(Testimony of Frank E. O'Neill)

on Exhibit 14 for identification, and tell us what the position is of the valves at that time and their function in those conditions?

A. Now, in Figure 2 of the same chart the trip valve is shown closed as it was shown in Figure 1. The main valve or the trap valve shown opened by virtue of the pressure from above and the helico spring is shown collapsed from the weight above it. The helico spring which in its expanded position held the main valve on the set has been collapsed by weight from above and the mandrel attached to the main valve has pushed the valve downward off its seat. In the meantime the load has been supported by this casing packer slips—by the casing packer slips. The equalizing valve has also been telescoped together, contracted, and the ports are now separated by packing. It is closed.

The Court: Has that all been accomplished by a half turn to the left or right? [241]

The Witness: About a half turn or turn to the left, sir.

Q. By Mr. Mellin: And then lowering the weight?

A. Letting the pipe down from the surface.

The Court: All the operator does is make the turn at the surface?

The Witness: Yes, sir, from the surface the drill pipe or tubing is turned to the left and then by the brake on the rotary equipment he allows it to go down slowly. It is, of course, supported with block and tackle.

The Court: When the turn is made, as I understand it, these four slips are then ejected, so to speak, from either side and grip the walls of the casing and bring the lower part of the testing apparatus to a stop?

(Testimony of Frank E. O'Neill)

The Witness: That is correct, sir.

The Court: Then the weight of the upper portion of the tubing or drill pipe and the apparatus comes down to the spring, collapses the spring, and then that brings about the opening of the valve?

The Witness: That is correct, sir. The same downward weight also brings about the expansion of the resilient member that packs off the annulus between the body of the tube and interior wall of the casing.

The Court: That is part of the function of the packer?

The Witness: That is correct, sir. [242]

The Court: Or functioning of the packer?

The Witness: That is correct.

Q. By Mr. Mellin: At that time, Mr. O'Neill, in what condition is the trip valve? A. It is closed.

Q. What is the condition of the tubing or the tool above the strip valve? A. It is empty of fluid.

Q. And that would be at atmospheric pressure?

A. At atmospheric pressure, yes.

Q. And maintained at atmospheric pressure up to the point where you have now reached, the bottom has packed off—has closed off the by-pass valve, have packed off and have opened the main valve?

A. That is correct, sir.

Q. Then what occurs? Now, at that point, Mr. O'Neill, are you in a condition to take a test?

A. Yes, sir.

Q. And what is done then to take the test—that is, to admit the sample of fluid from the zone below the packer upwardly through the tool into the tubing?

A. An iron rod, spoken of in the field as a go-devil, is dropped down through the empty tubing. That rod

(Testimony of Frank E. O'Neill)

strikes a plunger which is a portion of the trip valve. It unlocks the trip valve and the trip valve is lifted off its seat, [243] partly by fluid pressure, and then partly by spring pressure because it opens upward. In that position the fluid which before had only passed the open main valve is allowed to go on into the tubing.

Now, that condition is permitted to exist until the operator is satisfied that he has sufficient test.

Q. And when the operator of the tool believes he has sufficient test then what does he do, if anything?

A. Then the driller at the surface picks up with his machinery on the tubing to which the tool is attached.

Q. Now, at that time, Mr. O'Neill, the whole tool and the tubing, at least a greater part of its weight, is suspended from the draw works, isn't it?

A. Yes, sir. In packing off you normally wouldn't pack off with more than, oh, five points on the weight indicator, which would be roughly five tons of weight.

Q. And what proportion—

A. Sometimes six or seven, but five or six would be average.

Q. And that is only a portion of the entire weight of the drilling string usually?

A. Oh, yes, the whole weight might be 20 or 30 or 40 points.

Q. 30 or 40 tons?

A. Depending on the depth. Each point represents a [244] ton—approximately a ton. It isn't exactly a ton because of the way in which the blocks are strung, so it is just considered in the field a ton. We will say a point is a ton when it isn't actually a ton, but it is approximately that.

(Testimony of Frank E. O'Neill)

Q. All right. Now, you have the tool with the by-pass valve closed, the packer set, the equalizing valve closed, the main valve open and the trip valve open and the fluid has passed upwardly in what direction?

A. The fluid has passed on through the anchor, up through the central bore of the packer, through the central bore of the equalizing valve, around the main valve, through the central bore of the main valve, the mandrel, through the bores in the trip valve, and on into the tubing and that fluid has raised in there by virtue of the differential pressure from the formation being tested and the atmosphere in the tubing. [245]

Q. Now, at that time does the hydrostatic head of the fluid above the packer have access to the interior of the tool?

A. No, sir. The hydrostatic head of the fluid above the packer is held up by the packer. That is the function of the packer, to pack that annulus off and prevent the hydrostatic head from having access to entry into the tool.

Q. Now, you desire to trap the sample. You have the sample in the tool. Then what do you do to entrap it and bring it to the surface?

A. The driller at the surface will pick up on his drill pipe or tubing, and as the tubing moves up, tension or pressure down on this helical spring is relieved, and between pulling up on the tubing and the action of the spring, the main valve is moved upward against its seat in a closed position. The trip valve remains open. It can't be closed until it is set manually at the surface again.

Q. What is the purpose, then, of the trip valve?

A. The trip valve is the valve of entry, because if in going into the hole we should through difficulties or

(Testimony of Frank E. O'Neill)

obstructions in the hole, or obstructions in the casing, hit the bottom of the packer, causing it to take weight, the main valve would open and fluid would immediately go into the tool. The trip valve has to be opened from a blow from above, so if the main valve opens and fluid goes in, it has no [246] effect, appreciable effect on the test, because this tube would probably hold, oh, I don't know, probably a pint of fluid or a quart of fluid is all.

The Court: That is the space between the main valve and the trip valve?

The Witness: That is correct, sir. And that would be of no consequence in a normal test.

Q. By Mr. Mellin: All right. Now, you have lifted the weight so you closed the main valve. Then what occurs?

A. Well, we continue this pull upward on the pipe, and depending on whether this equalizing valve is a locking or not locking—I won't go into locking, a locking type unless I am asked to—

Q. Just give its general function.

A. This equalizing valve will expand longitudinally and its ports will be aligned between the housing and the mandrel of the equalizing valve. During the test we have taken fluid out beneath the packer, and consequently holding the hydrostatic head up, we probably have a reduced pressure here, unless we run into a terrific flow, and even though it would be less, the hydrostatic head or the well would blow out.

Well, if I intend to pull on up and break the packer, or lift this—this is the actual hydrostatic head here and the low pressure below. When these ports are aligned, [247] then the fluid from the annulus passes down through the

(Testimony of Frank E. O'Neill)

port of the tool and through the packer and out through the perforated anchor, and is discharged beneath the packer, giving approximately, within a few feet of the hydrostatic head, the same pressure above the packer as below. In that position I can pull on up, open the by-pass valve by additional pull, and then very gently lift the packer off the seat, and start out of the hole with the tools.

Q. Now, at the time you open the equalizing valve, Mr. O'Neill, does the fluid that enters the equalizing valve from above the packer have access to the sample that has been entrapped above the main valve?

A. No, sir.

Q. Will the pressure of the hydrostatic head have any effect in opening the main valve at that time so that it can intermingle with the sample?

A. No, sir. The main valve is an upwardly seating valve, and when the hydrostatic head is released by the packer, it may be applied through the perforated anchor and upwardly against the valve, and merely tends to set the main valve tighter.

Q. All right. Now, what is done? You just pull out of the hole, do you?

A. Yes, the tool is extracted, withdrawn from the hole, and the drill pipe is normally run in what we call [248] stands, depending on the height of the derrick, but we roughly have 90 feet for the large derricks. They might not be exactly that, but at each of those stands it is unscrewed at the stand, and then they pick it up with the elevators and pull it to another stand, and set that back, and when they come to the fluid within the drill pipe, as they break the stand off they take a sample of the

(Testimony of Frank E. O'Neill)

fluid. They may take a sample on every stand, or they may only take a sample at the bottom of the tool.

Q. Why only at the bottom of the tool?

A. Well, if there isn't a lot of fluid taken in on the test, we know that from the packer down that we have mud fluid in the hole when we set the packer, and that amount of mud fluid is going to come in with the test. There is no way to get out of that.

Q. Is that a measured amount? Can you calculate that amount?

A. That amount could be calculated reasonably closely; substantially, you might say. Then when the area below or the zone below the packer has been cleared of the fluid, the formation fluid would come in behind it and we would expect to find the formation fluid the last fluid that entered the tool.

Now, that we would take out of the bottom sample. That is where under normal conditions of a shut-off test you might [249] get a production test, whereas if it came in under terrific pressure, and you left that mud, you might take whatever material flowed in.

Q. Then, as I understand it, the last sample just above the main valve is an important sample?

A. It is an important sample.

Q. Now, do you have with you, Mr. O'Neill, a model well and a model Johnston tester tool which will demonstrate the operation of the tool, and can you do that for us?

A. Yes, sir.

Q. Is that the tool, the model standing on the floor?

A. That is the model, yes, sir.

Mr. Mellin: May I have that marked, for identification, your Honor, Plaintiff's next in order?

(Testimony of Frank E. O'Neill)

Q. By Mr. Mellin: Now, will you tell us, Mr. O'Neill, whether that—

The Court: Do you call that an operating model?

Mr. Mellin: It is an operating tool.

The Court: That is Exhibit 15, for identification, is it, Mr. Mellin?

Mr. Mellin: Yes.

(The model referred to was marked Plaintiff's Exhibit 15, for identification.)

Mr. Mellin: With the court's permission, may we move over here? [250]

The Court: Yes. And will you please all keep your voices up so that we can hear from here.

Mr. Mellin: And can we move the other tool so that your Honor can see?

The Court: Yes, if you will. What has just been marked Exhibit 15, for identification, is, as I understand it, an operating model of the Johnston tester now in use. Is that it?

Mr. Mellin: Yes, sir.

Q. By Mr. Mellin: You have in your hand the actual model of the Johnston tester. I notice that it has a cone type packer? A. Yes, sir.

Q. In making a test, Mr. O'Neill, is there any difference in function between a cone type packer and a casing packer, other than the cone type packer seats on a shoulder and divides the well bore into an upper and lower zone, and a casing packer seats in a casing and divides it into an upper and lower zone?

A. No. The function of the packer is to divide the well bore into an upper and lower zone, and we wedge packers depending on conditions we are running in.

(Testimony of Frank E. O'Neill)

Q. Will you briefly explain the operating model well and tell us how you simulated, as nearly as you could, the actual well conditions? [251]

A. I have here a vertical glass tube, glass for transparency. It contains mineral oil, which is supposed to represent the drilling fluid within the well at the time that the tools are run in. On the back of this panel I have a little hand pump, a pressure chamber, and at the base, this metallic base, in actuality there is a pressure chamber. In that metallic base I have water with red aniline dye in it to represent the fluid in the formations that we would get by testing. In view of the fact that I don't have natural formation pressure, I use the pump to put a little pressure on the tank below so that the fluid would rise in the tool and could be so seen.

Q. I notice that the well casing, or what simulates the well casing is not full of mud fluid. Will you explain why that is?

A. With mud fluid we wouldn't be able to see the tool at all.

Q. I mean, why don't you fill it completely with water?

A. Oh, because as we go into a well with a testing tool we constantly flush mud out at the surface, due to the displacement of the pipe, and I tried to leave this fluid low enough so that I would not flush it out on the floor.

Q. Now, would you proceed with the test, Mr. O'Neill, and tell us what is occurring as each step takes place. [252]

By the way, Mr. O'Neill, with respect to this model well and model tool, what do you use to simulate the weight of the drill pipe?

A. This level arrangement. It is impractical to have enough drill pipe above it, so I use that lever.

(Testimony of Frank E. O'Neill)

Q. Now, in this condition, Mr. O'Neill, according to your description the trip valve at the top is closed, the main valve is closed, the equalizing valve is closed, and the by-pass valve is open; is that correct?

A. Actually the equalizing valve is open, in this instance. It has been pulled open by the weight of the packer.

Q. Does that affect the operation of the tool?

A. It doesn't affect the operation of the tool in any way.

Q. All right. Now, as I understand it, it is being lowered into the well, as if it were in an actual well?

A. Yes, and down here there is a reduced bore, like a shoulder, and as the tool approaches, it is guided into that bore and the cone packer seats on the shoulder.

Q. And that simulates the seating of the packer, either of the cone type or formation packer?

A. That is correct.

Q. That divides the well bore into an upper and lower zone, does it not?

A. That is correct. The lower zone below the packer [253] and the upper zone above the packer in which the well fluid is trapped, so the hydrostatic head or drilling fluid is trapped above the packer.

Q. In that condition, resting on the shoulder, by the very fact of resting on the shoulder is the main valve open or closed, assuming there is no weight of drill pipe on it?

A. With no weight of the drill pipe on it, the main valve would be on its seat, but in a closed position. The main valve opens as hidden behind this metal collar here, or pretty nearly hidden behind it, but it has not been compressed. It is simply resting on the seat.

(Testimony of Frank E. O'Neill)

Q. Will you impose the weight, as you described, impose the weight of the drill pipe on the tool and tell us what occurs in the sequence that it occurs?

Mr. Foster: Before we go to that, I wonder if I may ask a question at this stage of the proceedings?

Mr. Mellin: Yes.

Mr. Foster: I understand, Mr. O'Neill, if you had an actual well the rat hole, that is, this cylinder down here—this cylinder down here of a reduced diameter, below the packer, simulates a rat hole?

The Witness: Yes, sir.

Mr. Foster: As a matter of fact, in an actual oil well wouldn't the drilling mud fill the rat hole?

The Witness: Yes, it would. [254]

Mr. Foster: So that to this extent you have the red liquid in the apparatus in the lower cylinder space simulating the rat hole and you are not imitating actual conditions in a well, filled with mud, are you?

The Witness: No. In the model it seemed to be impractical to get the drilling fluid all the way down and start to bring it up with the pressure.

Mr. Foster: Now, as I understand it, this colorless oil up in here, that simulates the drilling fluid?

The Witness: That is correct.

Mr. Foster: And if we were to simulate actual conditions in the well, that colorless liquid should fill entirely the rat hole, so that we should not have the three inches at all of the red liquid in the rat hole?

The Witness: That is right.

Q. By Mr. Mellin: In other words, then, Mr. O'Neill, in actual conditions there is a small intake of

(Testimony of Frank E. O'Neill)

mud in the rat hole or in the zone below the packer, which enters the tool prior to the formation fluid?

A. That is correct.

Q. Yes?

A. The fluid is in the bottom of the hole when we seat the packer, and it remains there until we open the tool.

Q. Now, I see your man is pumping back there.

A. He is pumping a little pressure on this tank to [255] cause the fluid to rise in the tool when the valves are opened.

Q. All right. Now, will you apply pressure to the top to simulate the imposition of weight on the tool, and tell us what happens, first.

A. As the pressure is brought down, the upper portion of the drill pipe is pulled down, the spring is compressed and the mandrel on the main valve passes through, causing the main valve to leave its seat.

Q. And open the main valve? A. Yes, sir.

Q. And what has happened to the equalizing valve?

A. The equalizing valve has been closed by other pressure downward. It is in a contracted position in the telescoping mandrel and housing.

Q. Now the tool is in condition to make a test?

A. The tool is now in condition to make a test.

Q. And what is done?

Mr. Foster: May I again interrupt, so that we don't have to duplicate this?

Mr. Mellin: Surely.

Mr. Foster: Do I have the court's permission?

The Court: Yes, but please keep your voices up.

Mr. Foster: Can you tell us the pressure that is exerted from the top of the tool now, when the main valve opened? [256]

(Testimony of Frank E. O'Neill)

The Witness: I don't frankly know just how many pounds he pulled down on the lever.

Mr. Foster: Can you tell us at this stage the pressure that is exerted upon the tank at the base of the device by the air pump?

The Witness: Yes, we have a gauge on it here, sir.

Mr. Foster: What was that pressure?

The Witness: It shows five pounds here.

Mr. Foster: That was a five-pound pressure when the main valve opened?

The Witness: Yes, sir.

Q. By Mr. Mellin: Approximately what would be the weight of the mineral oil above the packer, if you know, Mr. O'Neill? Would it be in excess of five pounds?

A. Well, I would say yes, possibly, but I am guessing.

Q. Now, what do you do to operate the tool? What is the rod that your assistant has?

A. The rod represents the go-devil, which is brought through the drill pipe to open the trip valve, the plunger of which can be seen through the transparent part of the housing of the tool. The rod will be dropped in, it will strike the plunger, and it should open that valve.

The Court: The operation of that lever at the top, with the handle on it, that is the turn to the left that you described of the tubing, which would permit the weight of [257] the string of pipe to compress the large spring, to open the main valve?

The Witness: Using this type of packer, sir, the cone type, it wasn't necessary to rotate to the left to arm the packer, because it does not have steel slips on it. I couldn't get steel slips to seat in the hard glass tube, so I had to use a cone packer.

(Testimony of Frank E. O'Neill)

The Court: The pressure you have applied to the model, Exhibit 15, for identification, simulates merely the weight of the drill pipe in wedging the packer into place; is that correct?

The Witness: That is correct.

Q. By Mr. Mellin: And sufficient to open the valve?

A. And sufficient to open the valve.

The Court: Well, the weight of the string of pipe itself compresses the large spring, does it?

The Witness: Yes, sir.

The Court: As the packer stops the movement of the string of pipe?

The Witness: That is correct, sir. That is correct. The weight of the pipe above it, which is telescoped, the mandrel of the valve and the spring is caught between the two parts of the valve, and it compresses the spring and pushes the valve off of its seat.

The Court: Is there a method of calculating that weight [258] in wells of extreme depth so that the packer can sustain it?

The Witness: Yes, sir. The wells today are practically all equipped with what is known as a weight indicator, and we know how many points on the indicator the string weighs before we seat the packer. Then when we seat the packer, we can let the weight down until we have six points on, or five points, or seven, or eight.

The Court: And the remainder is suspended weight?

The Witness: The remainder is still suspended from the derrick by means of a traveling box and cables.

Mr. Foster: May I ask a question, your Honor?

The Court: Yes.

(Testimony of Frank E. O'Neill)

Mr. Foster: I don't understand yet, Mr. O'Neill, why it isn't possible to have this level of rotary mud such that it completely fills the rat hole around the instrument before you open the valve with the dropping of the rod. It doesn't simulate the actual conditions. Why can't the red liquid be down in the tank here, at the bottom of the rat hole, as would be the case if we were, as I understand it, simulating actual conditions?

The Witness: I could probably pull it down. I have an idea we poured a little too much fluid in, Mr. Foster, but I could—

Mr. Mellin: We will stipulate, your Honor, that the hole below the packer, that is, the zone below the packer is [259] full of mud and will also stipulate that some of that mud goes into the tester ahead of the formation fluid. I don't think there is any point to it, though.

The Court: My question is, if you permitted all of that red fluid to go back into the tank at the base of the metal, by applying whatever pressure is needed, it would surely come out, wouldn't it?

The Witness: Yes, sir. And I could force all of the fluid out of this tank but I would then force it over the top of this pipe string. It is not possible for me to have enough pipe in here to represent the drill pipe in length.

The Court: Is it true that if you did what Mr. Foster suggested now, permit the clear oil to fill the space simulating the rat hole, and the remainder of the hole, would it mean only a difference in pressure to compensate for what is in the rat hole?

The Witness: It would merely mean that I would have to bring more fluid into my drill pipe, and that would

(Testimony of Frank E. O'Neill)

be just continued pressure, to raise it, and all of the clear oil below the packer would come into the drill pipe and then the fluid from the reservoir would come in.

The Court: If, as it stands now, it requires five pounds of pressure to pull the red liquid up into the tester, would a greater pressure be required to pull the red liquid up if the red liquid were all retreated into the tank at the [260] base?

The Witness: No, sir. It would be lifting the same hydrostatic head of fluid. It is just the difference in color.

Mr. Foster: I don't think pressure is involved, your Honor.

The Court: Both of them are of the same gravity, are they?

The Witness: The red fluid is water with an aniline dye in it, and the white fluid is a little lighter. It is mineral oil.

The Court: What is the reason, then, that the red fluid can't all be put in the tank at the base?

The Witness: I think it can. I think I can do it.

Mr. Foster: It was that way, your Honor, when the court started, but before they commenced the test, it seemed to me they deliberately changed it so that we have a distorted picture.

Mr. Mellin: The only difference will be that the red fluid will immediately start into the tester. The other way a little white fluid will come in first. What they are worrying about is that some mud comes in in actual use, and I will stipulate that it does.

The Court: I understand it does, but I would assume that the red fluid filling the rat hole, and having a head [261] start, would require less pressure for it to

(Testimony of Frank E. O'Neill)

enter the tester than it would if all of the red fluid were down in the tank and had to be forced up that additional—

The Witness: By the head of the white fluid that would be resting on it? In other words, if I took the volume of this red fluid, which is this small few inches that Mr. Foster referred to, and transmitted it into this tube, if it were white fluid, then the red fluid would have to lift the white fluid to get into the tube. Is that the question?

The Court: That is what I am asking.

The Witness: That is correct.

Mr. Foster: It is for that reason and because Mr. O'Neill has admitted this red liquid should not be here that I think the level should be adjusted so that the red liquid is all down in the base before we drop the rod to open the valve.

The Court: Can't you adjust the apparatus, then, to where the so-called red liquid, which is to simulate the formation fluid, the red liquid—

The Witness: Yes.

The Court: —so that you will have that all out of sight?

The Witness: I can try.

The Court: Very well. You mean you can do it today?

The Witness: I think so. I hope I can do it while I am here. [262]

* * * * *

The Court: You may proceed.

Mr. Foster: Might I have the court's indulgence of another question of Mr. O'Neill?

The Court: Have you removed the red fluid?

(Testimony of Frank E. O'Neill)

Mr. Foster: Yes, he has, your Honor.

The Court: You may proceed.

Mr. Foster: Mr. O'Neill, as I understand it, the uppermost liquid in this apparatus marked Plaintiff's Exhibit 15 for identification, is oil and the lower liquid is water, is that correct?

The Witness: The number for identification, does that include the entire well?

Mr. Foster: Well, the entire apparatus here, Exhibit 15.

The Witness: Yes, this clear fluid above is mineral oil and the fluid below in the tank, the red fluid, is water with aniline dye in it.

Mr. Foster: Then, as I understand it, we have the lighter liquid on top of the heavier liquid, is that true? We have a liquid on top of a lower specific gravity than the liquid on the bottom?

The Witness: That is correct.

Mr. Foster: Whereas in a well we would have rotary mud on top and the formation liquid on the bottom?

The Witness: That is correct. [264]

Mr. Foster: In an actual well, therefore, the conditions of this model would be reversed and we would have a liquid of a higher specific gravity on top and a liquid of a lower specific gravity on the bottom?

The Witness: Yes, sir.

Mr. Foster: And you say there is five pounds pressure now that has been placed or had been placed on the apparatus when the main valve was released?

The Witness: Well, five pounds on now.

Mr. Foster: And you earlier found that at the time of the release of the main valve? Is this five pounds

(Testimony of Frank E. O'Neill)

pressure on that gauge having due regard to the scale of the model? Is that typical of formation pressure in an actual well?

The Witness: No, I cannot say frankly that that is computed on a basis of formation pressure.

Mr. Foster: Now, isn't it true that there is a greater difference in the specific gravity—strike that if you will, please.

Isn't it true that the difference in the specific gravity of mud and oil is greater than the difference in the specific gravity of the oil and water you have in the model?

The Witness: Yes, the mud is heavier than the water.

Mr. Foster: Now, the difference in specific gravity between the mud and the oil that comes from the formation in a well, that difference is greater than the difference in the [265] specific gravity of the oil and water you have in this model, is that true?

The Witness: It probably is, sir. I think it probably is.

Mr. Foster: Then, your Honor, I move that testimony with respect to this model be stricken and that the court direct no demonstration of the model be had for these reasons:

A force has been exerted upon the upper end of the apparatus within the model by a hand lever which Mr. O'Neill cannot give us the value of, and hence, he cannot represent that it is in any way related to the weight of a drill pipe or simulates the condition in a well.

Second, he cannot say that the five pounds pressure which he is putting upon the apparatus is in any way related to the conditions found in an oil well.

Third, he has said that there is a 'greater—that the difference in the specific gravity of mud and the forma-

(Testimony of Frank E. O'Neill)

tion liquid which come in contact with an actual well is greater than the difference in the specific gravities of oil and water which he is using in this model; and, finally, and I think this is very important, he has said that in the model he has a heavier liquid on the bottom, the water, and a lighter liquid, the oil, on top. And he has said that that is just the reverse of the condition in an oil well where he [266] has a heavier liquid, the rotary mud on top, and the lighter liquid, the formation fluid, perhaps shot with gas, on the bottom.

I feel, therefore, that going further with this demonstration can afford no light upon the subject because all of these conditions are not only not typical of those found in an oil well but are the reverse of those found in an oil well.

The Court: Doesn't it all add up to this, Mr. Foster, that there isn't enough pressure on the formation liquid to force the formation liquid up into the tool, and all these factors you speak of deal with getting the formation liquid into the tester?

Mr. Foster: No, your Honor. I feel it goes farther than that. In an actual oil well we would have the rotary mud here on top and we would have a lighter liquid from the formation on the bottom.

The Court: What effect does that have?

Mr. Foster: The heavier liquid would tend to pass down through the lighter liquid.

The Court: It would tend to depress the lighter liquid but you have the rotary mud separated largely from the lighter liquid by your packers.

Mr. Foster: But when the packer is released, your Honor, or when the valve is released so that the light-

(Testimony of Frank E. O'Neill)

er [267] liquid from the formation can come in, the rotary mud from the formation also comes in. It comes in first and that rotary mud passes up through here and in a well it is heavier than the liquid which follows it, whereas here the conditions are reversed.

The Court: Well, all it does is in part, contaminate the test.

Mr. Foster: Yes, your Honor. I feel this is not proper for the reasons I have given.

The Court: We are not actually making a test. This model is designed not to take a test but to show how the apparatus functions.

Mr. Foster: Yes, but to the extent that it is attempting to show the operation of a device in a well in taking a sample it is wrong in all respects that I have indicated because they are reversed.

They have not only failed to simulate the conditions but they have reversed the conditions that are found in a well. Perhaps I haven't made myself clear. It is not that I am urging the apparatus will not take a sample. It is the fact that they have reversed the conditions in a well so that—

The Court: The conditions you speak of are conditions that either aid or deter the sample entering the tester, isn't that correct? [268]

Mr. Foster: Or contaminating it. Yes.

The Court: Isn't that correct?

Mr. Foster: They affect the goodness of the sample.

The Court: It is stipulated here that every sample is contaminated to the extent of drilling fluid or whatever may enter the tester or the fluid that is between the packer and the bottom of the well, isn't that correct?

(Testimony of Frank E. O'Neill)

Mr. Mellin: Yes, your Honor.

The Court: We have an admission of contamination and I suppose the amount of contamination depends upon the quantity X, the distance between the bottom of the packer and the bottom of the well. If the packer were high up in the well there would be greater contamination and I suppose that is compensated for in some instances by a larger sample.

Mr. Foster: Is that stipulated, Mr. Mellin?

Mr. Mellin: Stipulated this, as the court said, when the packer is set there is mud in the well and an unknown amount enters the tester. But Mr. Foster has stated a false premise. The weight of the mud fluid will have some effect on the sample after the sample has been taken. It doesn't make a particle of difference in this tool if that mud fluid is light or heavy because the moment that the tool is lifted and before the packer is unseated the valve, as the witness testified, the trap valve is closed so that the mud fluid cannot enter the tool, so whether the hydrostatic [269] head is greater or less doesn't make a particle of difference after the packer is released.

The Court: As I understand it, pressure has to do with forcing the sample up into the tester. Is that correct, Mr. O'Neill?

The Witness: Yes, sir. The differential pressure below the packer and inside the tube of the receiver.

Mr. Mellin: Which is empty when the test starts?

The Witness: Which is empty when the test starts and the fluid will go in there—there is sufficient differential pressure to cause it to move up. There is some friction through the tool.

(Testimony of Frank E. O'Neill)

The Court: I suppose, conceivably, the pressure in the formation might be so low that you couldn't coax the fluid into the tester?

The Witness: That might happen, sir.

The Court: The motion is denied.

Mr. Foster: So the record may be clear may it appear that none of the stipulations requested or suggested in our afternoon session have been accepted by the plaintiff?

Mr. Mellin: I made the stipulation earlier, Mr. Foster.

Mr. Foster: You made an admission. Let us put it that way.

The Court: Let us be clear, gentlemen. What stipulation do you propose? [270]

Mr. Foster: Well, the stipulation I asked for was a stipulation that should have been worded as an admission from Mr. Mellin, that the statements made by your Honor were correct; that is, that the greater the distance from the packer to the bottom of the hole the greater the quantity of mud that would enter the tester when the tester was open.

The Court: Let us ask Mr. O'Neil about that. Is that true, Mr. O'Neill? I made a statement that I assumed the greater the distance between the bottom of the packer and the bottom of the hole the greater the quantity of the drilling fluid or mud that would enter the testing apparatus?

The Witness: Well, actually, sir, the distance, the greater the distance between the bottom of the packer and the lowest inlet port to the tool, the mud fluid that is down below that point, provided it is not opposite a formation that would drive it, would probably be quiescent.

(Testimony of Frank E. O'Neill)

The Court: And permit the lighter fluid to rise through it?

The Witness: No, no, not that, sir. In other words, many times we will be taking a test at a considerable distance off of the bottom and perhaps there will be perforations up here and way down in here there are no perforations, but it is still full of mud. Now, when we let the tool in the lowest inlet port to the tool might be down two or three feet below the perforations in the pipe, but a long ways from [271] the bottom of the hole and there is no opening in the pipe at the bottom of the hole in such case as to cause this very bottom fluid to come up, so the bottom fluid will lie quiescent and the fluid from the formation can go through the perforations.

The Court: From the side?

The Witness: From the side would enter the lowest ports, entrance ports into the tester, and then go up and that would really govern the fluid taken in below the packer unless, as I say, we are testing where the whole formation is open and then from the bottom of the hole. Have I made it clear, sir?

The Court: It is clear to me. Does that cover the matter, Mr. Foster?

Mr. Foster: Well, it doesn't answer these points that I have raised, your Honor.

The Court: I mean so far as the subject under discussion is concerned it is clear the way in which I stated it?

Mr. Foster: Yes, except under the last condition that Mr. O'Neill named, where he said if the packer were set, as I understood him, near the bottom of the hole in an open hole formation, for example, then it is true that all

(Testimony of Frank E. O'Neill)

of the mud below the packer to the bottom of the hole would enter.

The Witness: Would be expected to, yes, sir.

Mr. Foster: And therefore the greater the depth of that [272] hole under those circumstances the more of the mud that would enter the tester.

The Court: Except where you are taking a test out of the rat hole at the bottom of the hole the statement of the court would be correct?

The Witness: Yes, sir.

The Court: But where you are taking the fluid from the perforations in the side of the casing the situation would be as you have described it?

The Witness: Yes, sir.

The Court: You may proceed.

Mr. Mellin: Now, as I understand it, the tool is now in the position which you would assume awaiting a test? That is, the trip valve up above is closed?

A. Right here.

Q. By Mr. Mellin: The trip valve is closed maintaining atmospheric pressure in the tubing above the trip valve? A. That is correct.

Q. The trap valve or main valve is open to admit a sample? A. Hasn't been opened yet.

Q. Will you put the pressure on it and the lever pressure simultaneously to open the main valve and collapse the spring so a sample can enter? A. Yes. [273]

Q. Now, the purpose of the main valve ultimately is to trap the sample above the main valve and the by-pass valve, equalizing valve is closed and the by-pass valve is closed?

A. There is no by-pass in this packer.

(Testimony of Frank E. O'Neill)

Q. But the equalizing valve is closed?

A. Correct.

Q. So the tool is now in condition for a test awaiting the opening of the trip valve?

The Court: All that remains to be done now, as I understand it, is to drop this go-devil so as to open the trip valve?

Mr. Mellin: That is correct.

The Witness: That is correct.

Q. By Mr. Mellin: Now, will you drop the go-devil?

A. As it strikes this plunger it should release the trip valve. It has such a short distance to drop it didn't quite release it.

Mr. Foster: Does that often happen in actual practice?

The Witness: No. We have so much further to drop it that it rarely happens. Now it is open and you can see the fluid coming up. There is the white fluid below the packer, entering it, and the red fluid from the formation behind it and it can be seen again when it approaches here, and the red fluid from the formation is passing on through the main valve, through the trip valve and apparently— [274]

The Court: The rest of it is simply a matter of pressure?

The Witness: That is correct, sir.

Q. By Mr. Mellin: Now, that the tool is in the condition to allow the sample to enter in above the main valve does the hydrostatic head exert any pressure on it?

Mr. Foster: May I interrupt for just a moment? I notice here we have zones of white liquid intermediate of the tool and above and zones of red liquid above.

(Testimony of Frank E. O'Neill)

The Witness: There is some white liquid in there; apparently there is something that isn't sealed completely and some of the hydrostatic head may have entered.

Mr. Foster: In other words, we have a zone of the lighter liquid in the tool below a zone of the red heavier liquid as the apparatus now stands and then a zone of white liquid above the zone of red liquid again, is that correct?

The Witness: The zone of white liquid above the red liquid came in below here.

Q. By Mr. Mellin: Below the packer?

A. That is the first fluid that entered. That is the mud below the packer. The red liquid came on through. There appears to be some white liquid here which would indicate a leak in the device.

Mr. Foster: The word "here" does not show in the record. Isn't it true, Mr. O'Neill, that as the apparatus now stands, [275] at the bottom of the tool we have a zone of white liquid and we have a zone of white liquid up here at about the middle of the tool, and then three-quarters of the way up we have a zone of red liquid, and then at the top of the tool, inside the tool, we have a zone of white liquid. Isn't that true?

The Witness: As the apparatus now stands, there is.

Mr. Foster: Can't you answer the question yes or no? Isn't that true?

The Witness: Will you repeat the question?

Mr. Foster: Will you read the question, please?

(Question read.)

The Witness: Yes, that appears to be the case.

(Testimony of Frank E. O'Neill)

Q. By Mr. Mellin: What would occasion that, Mr. O'Neill?

A. There is either a leak on the packer seat or a leak in the tool, I don't know which it is.

Q. And in the making of an actual test would you call this a successful or unsuccessful test?

A. That would be an unsuccessful test, sir.

Q. In actual practice it would have to be run over, would it?

A. It would be required to be run over in all probability.

Q. Now, as I understand it, at this point the valves, [276] the trip valve is open, the main valve is open, still open, and the equalizing valve is closed, is that correct? A. That is correct, sir.

Q. What is the first thing that occurs now when you start to remove that tool from the well?

A. The pressure, the force downward would be relieved from the top of the drill pipe.

Q. Just a minute—all right, go ahead.

A. The drill pipe will be picked up; in this case merely we will raise this lever and take the pressure off and raise up on the pipe enough to let the spring expand here, the main valve helical spring and this main valve move upward and seat against the seat of the main or trap valve.

Q. And what does that do?

A. That traps within the tool above the main valve, the fluid which has passed upwardly past the main valve and on into the tubing.

Q. And does that main valve close before the packer is unseated? A. Yes, sir.

(Testimony of Frank E. O'Neill)

Q. And thereafter when the packer is unseated what effect, if any, would the hydrostatic head have on the main valve?

A. Merely tend to press it tighter against its seat.

Q. And what condition is the trip valve in now? [277]

A. The trip valve is open.

Q. And it remains open from here in, does it, until the tool is removed from the well?

A. Until the tool is removed from the well and reset manually.

Q. And at the present state with the packer still seated, the equalizing valve is still closed, is it not?

A. That is correct, sir.

Q. Now, what is the next operation?

A. The next operation would be to raise up slowly on the pipe and the equalizing valve, you see here, has expanded and the fluid from the hydrostatic head passes through this in below the equalizing valve.

Q. And downward?

A. Downwardly and into the rat hole chamber to equalize the pressure above and below the packer.

Q. All right. Now, as you continue to pull out what is the next, after the equalizing valve is open and the pressure above and below the packer is equalized, what is the next step?

A. To lift the packer off the seat by an upward movement of the drill pipe.

Q. And now where is the sample that was taken?

A. The sample is trapped in the pipe above the main valve. [278]

(Testimony of Frank E. O'Neill)

Q. All right, that is fine. What are you going to do with the tool now?

A. Just leave it set in the model for the moment until we have to use it again.

Q. Bail it out or something?

A. Yes, if we have to run it again.

Q. Will you take the stand again, please?

Mr. Foster: At this point, your Honor, we move to strike the testimony with regard to this test because it is admittedly an unsuccessful one.

The Court: Motion denied.

Mr. Mellin: At this time, your Honor, I would like to offer in evidence the enlarged chart of the Johnston tester offered for identification as Plaintiff's Exhibit 14, as 14 in evidence.

The Court: That is the chart on the easel?

Mr. Mellin: Yes, your Honor.

The Court: Which has the four figures on it?

Mr. Mellin: Yes.

The Court: The four drawings?

Mr. Mellin: Yes.

Mr. Foster: Are they drawn to scale, Mr. Mellin?

Mr. Mellin: I think so. I think some of the valves are not precisely drawn to scale but diagrammatically illustrate the witness' testimony. [279]

Mr. Foster: Then I object to it since it is not precisely accurate, on the ground it is irrelevant and immaterial. Do you intend to offer the drawings which you gave us a copy of with your interrogatories as illustrating the plaintiff's tool?

Mr. Mellin: Oh, yes.

(Testimony of Frank E. O'Neill)

The Court: Is this Exhibit 14 a duplicate of the drawing?

Mr. Mellin: Except for minor details of construction of some of the different parts. For example, the minor details of two valves are not illustrated. As the witness said, it was merely diagrammatical of it to illustrate his testimony and show the opening and closing of the valves.

Mr. Foster: This is the drawing that was given to us with the interrogatories and on which our selection of claims to be relied upon as infringed are based.

Since the drawing is diagrammatic and wholly unlike this one, we object to it as inaccurate and immaterial and irrelevant.

The Court: Well, you have heard the witness' testimony. Did he testify in connection with this diagram to anything that surprised you with respect to the operation of the tester?

Mr. Foster: I think not, your Honor.

The Court: The diagram is only for the purpose of [280] illustrating Mr. O'Neill's testimony, so the objection will be overruled and Exhibit 14 for identification is received in evidence.

(The chart referred to was marked as Plaintiff's Exhibit 14 and was received in evidence.)

Mr. Foster: Do you have a copy of that?

Mr. Mellin: That is the only one I have, Mr. Foster. The model of the Johnston tester referred to by the witness and marked for identification as Plaintiff's Exhibit 13, is offered in evidence as Plaintiff's Exhibit 13.

Mr. Foster: That is objected to on the ground, your Honor, that it has not performed a successful test.

(Testimony of Frank E. O'Neill)

Mr. Mellin: I beg your pardon. That is the small tester.

The Court: It is offered as an illustrative model of the tester now in use.

Mr. Mellin: That is correct, your Honor.

Mr. Foster: Is that offered also as illustrative of the testimony of the witness?

Mr. Mellin: I offered it in evidence, Mr. Foster.

The Court: The objection is overruled. Exhibit 13 for identification is received in evidence.

(The model referred to was marked as Plaintiff's Exhibit 13, and was received in evidence.)

Q. By Mr. Mellin: Now, Mr. O'Neill, in connection [281] with Exhibit 14 you did not describe which I see is marked on the chart as the pressure recorder. Will you briefly tell us what that has to do, if anything?

A. The pressure recorder is a clock driven recording gauge. At the time the tools are assembled to be run into the well the pressure recorder clock, which is wound up, is tripped and allowed to start to run. It rotates a chart and the pressure mechanism draws the pressures graphically on that chart from the time that the tool leaves the surface to the bottom of the well throughout the test, and until the tool is pulled back to the surface and the clock mechanism stopped manually.

The clock will operate, oh, I think up to about 72 hours.

Q. And does the addition of that pressure recorder at the bottom of the Johnston tester in any way modify or change the operation of the Johnston tester?

A. The addition of the pressure recorder to the bottom of the device has the effect of letting the operator know from the chart, whether or not the valves in the

(Testimony of Frank E. O'Neill)

tool have opened properly or whether the tool plugged during the test.

It has no effect on the operation of the device itself.

Q. Are you familiar with—by the way, may I strike that? To illustrate the witness' testimony I would like to [282] offer in evidence the operating model of the Johnston tester which has been marked 15 for identification.

Mr. Foster: That is objected to on the ground that it is a model that performed the unsuccessful test and it is immaterial and irrelevant.

The Court: Objection overruled, and Exhibit 15 for identification is received in evidence.

(The model referred to was marked as Plaintiff's Exhibit 15, and was received in evidence.)

Q. By Mr. Mellin: Mr. O'Neill, are you familiar with the construction and operation of the Johnston perforation gun? A. Yes, sir.

Q. And that is the gun which the plaintiff is utilizing today in its perforating operations? A. Yes, sir.

Q. Do you have with you an enlarged drawing of that showing the correct—accurately disclosing the construction of that gun and the parts thereof?

A. Yes, sir.

Q. Is that the drawing which is on the easel before you? A. Yes, sir.

Mr. Mellin: May I have that marked for identification, your Honor, as Plaintiff's Exhibit 16? [283]

The Court: The drawing or chart containing two illustrations of the perforation gun?

The Witness: Yes, sir.

(Testimony of Frank E. O'Neill)

The Court: Now in use by the Johnston Company?

The Witness: That is correct, sir.

Mr. Mellin: Is that 16, Mr. Clerk?

The Clerk: Yes, 16 for identification.

(The drawing referred to was marked as Plaintiff's Exhibit 16, for identification.)

Q. By Mr. Mellin: Now, I hand you what appears to be a model and is labeled "Johnston Perforator Gun." It has no operating parts and I will ask you if that is a simulation to scale of the external appearance of the Johnston gun?

A. The external appearance, yes, sir.

Q. Is that in a scale in proportion to the model, Plaintiff's Exhibit 13, the other model that you produced of the tester?

A. Yes, sir.

Q. Now, from the chart, Mr. O'Neill, Plaintiff's Exhibit 16 for identification, would you please approach it and explain to us, please, its construction and its mode of operation?

The Court: Do you desire this small scale model which the witness just identified marked for identification?

Mr. Mellin: Yes, I should like to have that marked for [284] identification as Exhibit 17.

Mr. Foster: We already have an Exhibit 17.

The Court: 17 is the book of patents.

Mr. Mellin: Yes.

The Clerk: This will be Plaintiff's Exhibit 18 for identification.

(The model referred to was marked as Plaintiff's Exhibit 18, for identification.)

(Testimony of Frank E. O'Neill)

Q. By Mr. Mellin: Now, from that drawing will you please proceed, Mr. O'Neill, and describe to us the construction and operation of the Johnston tester gun as used today by the plaintiff.

A. The gun is composed of a solid mandrel with a coupling on the top end of it and a connection is shown here by which this solid mandrel is connected to the bottom of the testing device. It has a solid mandrel and then the cage body with the bowed springs for frictional purposes.

It has a firing mechanism which involves the latch retaining rods, shown here at this point and so marked; the latch levers and a plunger which is a firing plunger. Below that the body of the gun which contains the barrels of the gun with the bullets; the powder charge for expelling the bullets from the gun and a central duct along the longitudinal axis of the gun, which central duct passes through the powder charge within the upper part of the gun or the gun [285] body, or just above the gun body is a coupling unit or coupling nut which carries within it a chamber in which .32 caliber blank cartridges can be placed with their detonating cap upwards.

Q. How many of those .32 caliber cartridges are there there?

A. They are run at times with two and at times with four. On the solid mandrel of which I spoke, there is a buttressed thread and in the cage body there is a tapered recess which carries within it and connected to it, a split nut with matching buttressed threads on the mandrel.

(Testimony of Frank E. O'Neill)

Q. Is the mandrel the member by which the gun is suspended in the well?

A. The mandrel is the member by which the gun is suspended. In the firing head the latch levers have rollers at each end and at the center.

The center roller is a locking roller which fits into a groove, a curved groove known as a locking groove in the firing piston and when the rollers are engaged in the locking groove they are held in engagement with the piston.

Q. Is that the plunger marked "Plunger?"

A. The plunger, I am sorry, sir. It is marked "Plunger" and held in engagement with the plunger by the latch retaining rods. The plunger is not able to move downwardly or upwardly. [286]

Q. In other words, it is like a trigger that is locked in position, is that correct?

A. That is correct, sir. The bottom end of the plunger extends into this cartridge chamber in which there is atmospheric pressure, sealed in. The top end of the plunger extends into the chamber above which is open to the hydrostatic pressure within the well.

Q. So that the hydrostatic head is constantly exerting a force on that plunger to drive it down to fire the cartridge?

A. That is correct, sir.

Q. And it is latched from doing that by those latch levers that you referred to?

A. That is correct, sir.

Q. Proceed.

A. When the gun has been suspended on the bottom of the tool and has been lowered into the well to the point at which it is desired to fire the gun, the drill pipe or

(Testimony of Frank E. O'Neill)

tubing at the surface is rotated to the right. It requires 12 turns of rotations on the drill pipe to finally free the firing mechanism or the plunger.

As the drill pipe is rotated to the right weight is lowered down onto the solid mandrel and the solid mandrel screws downwardly on its buttressed threads through the split nut. [287]

The reason for the split nut actually being split is that if in going into the well inadvertently the device is turned when we pick it up to take the slips out of the rotary table at the surface so the pipe can be lowered further, the mandrel is pulled back through the split nut and we still have 12 turns to make before the gun can be fired. That is a safety measure.

Q. In other words, that is to compensate for any inadvertent turning of the drill stem as it is lowered?

A. That is correct, sir.

Q. When the 12 turns with the attendant lowering of the mandrel have been made the threads on the mandrel have passed through and below engagement with the threads on the nut?

A. At that time the friction springs which have prevented the cage body from rotation and which will permit the mandrel to lower after the threads have been disengaged but will hold the cage body stationary, the lower member.

Q. Is it marked there "Latch Retaining Rods?"

A. Firing head assembly. It drops with reference to the latching retaining rods until this group of latch levers with the firing head assembly have passed downward a distance that puts the top rollers on the latch levers below contact with the latch retaining rods. At that time the

(Testimony of Frank E. O'Neill)

levers are allowed to spring apart as shown in Figure 2. The rollers [288] which were in the locking groove are forced out of the groove by the hydrostatic pressure. The plunger is driven downwardly into the low pressure chamber and the cartridge chamber has been so placed that the cartridges lie immediately below the descending plunger. The plunger strikes the cartridges and fires the blank cartridges. The flash from the cartridges passes downward through the central duct and the duct passing through the powder chamber, which explodes the powder, driving the bullets laterally or horizontally against the casing to perforate the casing.

Q. In other words, then, the gun is suspended, as I understand it, the gun is suspended in the tubing at the point where you desire to shoot or perforate and then the mandrel, the solid mandrel through the medium of the tube is turned 12 turns to the right, which releases the plunger so that the hydrostatic head can drive it against the firing cartridges to explode the powder chambers behind the perforating bullets. Is that correct?

A. That is correct, sir.

Q. You may take the stand again.

Mr. Mellin: May I offer this chart in evidence, your Honor, as Plaintiff's Exhibit 16?

The Court: Plaintiff's Exhibit 16 for identification is received in evidence. [289]

(The chart marked Plaintiff's Exhibit No. 16, was received in evidence.)

The Court: That is the chart concerning which the witness just testified?

Mr. Mellin: Yes, your Honor.

(Testimony of Frank E. O'Neill)

Q. By Mr. Mellin: Are you familiar with the construction and operation of the Johnston Tester and the Johnston Perforator Gun when they are assembled together for operation, Mr. O'Neill? A. Yes.

Q. This chart which is before you, do you recognize it?

A. Yes, sir.

Q. Was that prepared under your direction?

A. It was, sir.

Q. And does that accurately, although diagrammatically, illustrate the Johnston Tester with the Johnston Gun suspended below it for operation?

A. Diagrammatically, sir.

Q. And would you please—

Mr. Mellin: May I have that marked, your Honor, for identification, Plaintiff's next in order?

The Clerk: Plaintiff's Exhibit 19 for identification.

(The chart referred to was marked as Plaintiff's Exhibit 19, for identification.) [290]

The Court: This chart is in effect, I take it, a combination of this chart and Exhibit 14 in evidence, the tester plus the chart in evidence which is Exhibit 16 of the perforator gun?

Mr. Mellin: Practically so, your Honor. I think there is one additional view on here which became necessary to further explain the operation.

Q. By Mr. Mellin: Now, briefly, Mr. O'Neill, will you approach the chart and briefly give us the sequence of operation of the two tools when they are joined together with Exhibit 18, which is the Johnston Gun, and Exhibit 13, a model of the Johnston Gun—a model of the Johnston Tester. Will you tell us how they are put together?

(Testimony of Frank E. O'Neill)

The Court: You are referring now to Exhibit 18 for identification?

Mr. Mellin: Yes.

The Court: Being a small scale model of the Johnston Gun.

Mr. Mellin: Yes. Using those two would you tell us how they are assembled together as illustrated on Exhibit 19 for identification?

A. The gun is screwed to the bottom of the pressure recorder mechanism. The pressure recorder mechanism is shown and so marked on this chart. It is manufactured with a screw plug on the bottom so that two recorders may be run [291] together if we care to, and to put the two recorders together we merely remove the plug at the bottom and screw another recorder on and when we are running one recorder the plug is left there just to protect the threads. So, to connect the gun to the bottom of the recorder it is merely necessary to remove the plug from the bottom of the recorder and have a suitable connecting piece or collar or coupling that will screw to the gun and to the bottom of the recorder to attach the two together. It is merely screwed on the bottom of the device.

The Court: Which you are illustrating now by screwing Exhibit 18 for identification onto Exhibit 13?

Mr. Mellin: That is right, your Honor.

Q. By Mr. Mellin: Now, in that condition, when you have screwed the gun onto the bottom end of the tester, Mr. O'Neill, as you have just done in connection with Exhibit 13 and Exhibit 18, is the gun then ready to operate as a gun and the tester then ready to operate as a tester?

A. Yes, sir.

(Testimony of Frank E. O'Neill)

Q. Now, is that the condition which is illustrated in the chart, Exhibit 19 for identification?

A. Yes, sir.

Q. Now, just briefly will you describe to us how a perforation is effected and testing effected by reference to Chart 19, of the Johnston Tester with a Johnston perforator [292] gun assembled on the lower end thereof?

A. Well, Figure 1 of this chart 19 for identification, shows the tester and the valves as described in Figure 1 of the previous chart, Exhibit 14.

The Court: Figure 1 of Exhibit 14?

The Witness: Yes, sir. But it also shows the perforating gun attached to the bottom of a formation tester.

Q. By Mr. Mellin: With the gun in condition shown as in Figure 1 of Exhibit 16?

A. With the gun in the condition shown in Figure 1 of Exhibit 16, yes, sir.

And in that condition the combined device would be lowered into the well until a point is reached at which it is desired to fire the gun and at that time the supporting tubing at the surface would be rotated to the right 12 turns, lowered slowly as it is rotated. It is lowered merely to keep the split nut from jamming as it goes in—just keep lowering it a little bit, three or four inches, during the 12 turns.

Q. And during that turning what effect, if any, does that rotation of the drill stem to condition the gun for firing, have on the tester, if any?

A. None, sir.

Q. All right, proceed please.

A. The rotation is continued until the 12 turns have [293] been accomplished as described on the chart for identification 16, and the gun fires.

(Testimony of Frank E. O'Neill)

Q. Just a moment. At that time the gun is fired and the testing tool remains, the parts of the testing tool remain exactly as they are shown in Figure 1 of the chart, do they? A. That is correct, sir.

Q. And that is in exact accordance with the condition of the parts of the tester in Figure 1 of that chart in evidence as Exhibit 14? A. That is correct, sir.

Q. All right. Now, the gun is fired. Does that have any effect on any of the operating parts of the tester, the firing of the gun? A. None whatsoever.

Q. Does it condition the tester in any fashion for taking a test? A. Not at all, sir.

Q. Then what do you do at that time if you desire to take a test at that time?

A. If we desire to take a test at that time common practice would be to raise the gun or the tubing some six or eight or ten feet just to get the gun away from being opposite to the shot holes for fear of a rush of sand. It might sand it up. It isn't necessary but it is a safety [294] precaution. And at that time the drill pipe at the surface is rotated one turn to the left to unlatch the casing packer as previously described for the casing packer, and the weight is lowered down to set the casing packer, to pack off the annulus between the packer and the walls of the casing, to support the hydrostatic head.

Q. And is that exactly—and then from there in, in making the test, is the operation of the tester identical as you have described it when it is run without a gun and in connection with Exhibit 14 in evidence?

A. It is identical, sir.

(Testimony of Frank E. O'Neill)

Q. And during the time that the tester is operating is there any operation of the gun?

A. No, the gun finishes its work when it has been fired. Its work is finished.

Q. Now, does the operation of the tester in any way perform any operation with respect to the gun or modify its operation?

A. None at all. [295]

Q. Now, what do these figures on this chart illustrate, Exhibit 19, for identification? Just tell us the condition of the gun and the tester in each of the five figures.

A. Well, the condition of the tester in Figure 1 is the trip valve is closed, and the main valve is closed, the by-pass valve is open, and the packer has not been seated, and the gun is in a safety position. The plunger is held by the locking or the latched levers.

In Figure 2 we are in exactly the same position in the formation tester part, but the gun has been fired by rotating the 12 turns to the right, so the large levers have released the plunger and the plunger is down upon the cartridges in the cartridge chamber.

In Figure 3 the trip valve in the testing tube is still closed, the packer has been set and the main valve has been opened after the equalizing valve was closed. So the gun is in no different position from what it was in Figure 2, but the testing device is in a position now where a test could be started by dropping a go-devil down into the drill pipe to release the trip valve.

In Figure 4 the trip valve has been opened by dropping the go-devil. The main valve is still open, as it was in Figure 3. The equalizing valve is still closed as in Figure 3, and the by-pass valve is closed, as in Figure 3. The gun is in identically the same position it has been

(Testimony of Frank E. O'Neill)

since [296] it was fired in Figure 2, and in Figure 3 it remains the same.

Then in Figure 5 the trip valve remains open, the main valve has been closed by lifting up the weight of the tubing off of the helical spring and pushing up on the main valve. The equalizing valve has been opened by further upward movement of the drill pipe above. The by-pass valve on the packer has been opened. The packer has been pulled free of the pipe. The sample is trapped in above the main valve, and the gun is still in the position that it was in after being fired in Figure 2.

Q. Did the gun perform any operation whatsoever after it was fired? A. None whatsoever.

Q. Then did the tester perform any operation other than as a part of the drill stem, as apart from the firing of the gun? A. That is all.

Q. And as an intermediate connection between the gun and the tubing? A. That is correct, sir.

Q. Now, will you state whether or not the tester operates in exactly the same fashion in the well to perform a test with the gun attached, as it does without the gun attached? [297] A. Precisely the same.

Q. Will you state whether or not the gun performs precisely the same operation, whether it is run in with the tester or run in without the tester?

A. Precisely the same thing; the same operation.

Mr. Mellin: May I offer that diagram in evidence, your Honor, as Plaintiff's Exhibit 19?

The Court: Exhibit 19, for identification, is received in evidence.

(The diagram referred to was marked Plaintiff's Exhibit 19, and was received in evidence.)

(Testimony of Frank E. O'Neill)

Mr. Mellin: You may take the stand again, Mr. O'Neill.

The Court: Do you desire to offer 18, for identification, the small-scale model, into evidence?

Mr. Mellin: Yes, your Honor, I would like to offer that in evidence as Exhibit 18.

The Court: Exhibit 18, for identification, is received in evidence.

(The model referred to was marked Plaintiff's Exhibit 18, and was received in evidence.)

Mr. Foster: That it is not offered as representing all of the interior mechanism.

Mr. Mellin: No, just offered to show the outline, the exterior of it on the same scale proportion as the large sized one is to the full-sized tester. It bears the same [298] proportion to the model of the well tester.

Mr. Foster: Very well.

Q. By Mr. Mellin: Now, Mr. O'Neill, when a tester is employed and the packer is set and you desire to take a test in the zone below the packer, will you explain to us, please, what formation fluid, if any, enters the tools—the tubing through the tools for recovery with the sample?

A. When the tester is run into the well, the well is full of fluid, drilling fluid, to the bottom. The packer is seated.

Q. Now, is that packer seated in some precise place? Let's assume it is a casing water shut-off test and it has

(Testimony of Frank E. O'Neill)

been perforated for a test. Is the packer always seated in some precise relationship or almost precise relationship to those perforations? A. Above the perforations.

Q. I mean in distance, is that measured or not?

A. I wouldn't say it is measured. It is approximately 3 or 10 feet above the perforations; approximately that, sir.

Q. What would be the variance? I mean, you are able, aren't you, in running a tester in a hole to seat the packer at some precise level in the casing? A. Yes.

Q. Some precise horizon? [299]

A. Yes, you are able to do it. What governs it, frankly, is where the last stand of drill pipe comes on the derrick. If to seat the packer down very close to the holes would require putting up another joint of drill pipe so that the test would have to be operated where the go-devil is dropped from way up on the derrick, it is quite inconvenient that way. Sometimes they will forego four or five feet—

Q. I mean after the packer is seated.

A. (Continuing): —and work from the floor.

Q. After the packer is set, it is set at some place where the operator knows approximately where it is set above the perforations; is that correct?

A. That is correct, sir.

Q. Assuming the well has been perforated and the packer is set above the perforations and the tester is open

(Testimony of Frank E. O'Neill)

to take a test, what is the first fluid, if any, which will enter the testing tool for recovery as part of the sample?

A. The mud fluid from below the packer. The mud fluid below the packer would enter first.

Q. To what level,—I mean, to what extent would it enter with reference to the position of the perforations?

A. To the bottom of the perforations or slightly below the lowest perforations.

Q. Now, in the ordinary practice of taking tests, does the entrance of that amount of mud fluid mask the test? [300] A. No.

Q. Or mask the sample so that the results of the tests cannot be determined? A. No.

Q. In other words, that is a measured amount of contaminating fluid that enters the tool, which can be compensated for with the samples recovered from the tool; is that correct? A. That is correct.

Q. Now, with the Johnston tester, Mr. O'Neil, when the packer is released and the tool functions in its normal manner, is any fluid that had been confined above the packer any of that fluid permitted to enter the tool?

A. Not above the main valve.

Q. That is what I mean. —and permitted to enter and contaminate the sample? A. No, sir.

Q. In other words, the sample above the valve contains none of the fluid that was in the annulus between the tool and the casing, above the packer

A. That is correct.

(Testimony of Frank E. O'Neill)

Q. Now, the Johnston tester that you operated sometime after March, 1933, what type of packers did you employ personally?

A. I personally ran casing packers and I ran a rat hole [301] or cone packer. I personally didn't operate a straight wall packer.

Q. Did you supervise any operation using it?

A. Oh, yes, I supervised the operation of a great many of them.

Q. Now, in each of those instances will you tell us, please, whether or not the packer on the Johnston tester was for the purpose of dividing the well bore into an upper and lower zone?

A. That is correct, sir.

Q. And that was the function of the packers?

A. That is the function of the packers.

Q. Now, on these Johnston tools you have been testifying to, in each instance the main valve is operated from the surface of the ground, it is opened to admit fluid and closed to entrap the sample above the valve by manipulation of the tubing of the drill stem at the surface of the well?

A. That is correct.

The Court: We will suspend at this time until tomorrow morning at 10:00 o'clock. You may step down.

The trial will be in recess until tomorrow morning at 10:00 o'clock.

(Whereupon, at 3:50 o'clock p. m., Wednesday, July 16, 1947, an adjournment was taken until 10:00 o'clock a. m., Thursday, July 17, 1947.) [302]

Los Angeles, California

Thursday, July 17, 1947.

10:00 A. M.

The Court: Please call the calendar.

The Clerk: No. 5295, M. O. Johnston Oil Field Service Corporation v. Lane-Wells Company, for further trial.

Mr. Mellin: Your Honor please, at this time we would like to have a stipulation from opposing counsel that defendant, Lane-Wells Company, was the owner of the Mims patent, No. 1,582,184 issued April 27, 1926 from 1932 to the expiration of that patent.

The Court: Will you identify that by exhibit number?

Mr. Mellin: That is Exhibit 17-G, your Honor.

The Court: For identification.

Mr. Foster: What was the date of ownership?

Mr. Mellin: From approximately 1932.

The Court: Is it so stipulated?

Mr. Foster: I would like to investigate that, Mr. Mellin. It is my understanding that the defendant owned the patent at some time, but I believe in the first stages that there may have been a license. I will investigate that.

Mr. Mellin: Will you give me those facts at noon? My information was that it was from 1932.

Mr. Foster: If you have a copy of the assignment—

Mr. Mellin: I don't have, but I wanted to ask for the admission to save the proof. [304]

Mr. Foster: Yes.

Mr. Mellin: Mr. O'Neill, will you take the stand?

FRANK E. O'NEILL,

called as a witness by and on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Mellin:

Q. Do you have with you a copy of Exhibit 20 and the various patents that comprise that exhibit before you, Mr. O'Neill?

Mr. Foster: Exhibit 20?

Q. By Mr. Mellin: Exhibit 17. I beg your pardon.

A. Yes, sir.

Q. Now, will you turn to the Burr & Wakelee patent, No. 68,350, patented September 3, 1867, which is Exhibit 17-A, for identification, and tell us briefly what type of device is there disclosed.

A. The device disclosed is a device for testing wells, and in the title it says for testing deep wells. It contains two packer members.

Q. Are they large B? A. Large B.

Q. And are they spaced apart?

A. Yes, sir, they are spaced apart. [305]

Q. Will you tell us whether or not they are intended to be expanded into contact with the wall of the well to divide the well into a central zone, a lower zone and an upper zone? A. They are.

Q. And are they capable of being contracted and withdrawn from the well?

Mr. Foster: That is objected to. These questions are leading, your Honor.

Mr. Mellin: I am just trying to shorten it.

(Testimony of Frank E. O'Neill)

The Court: They are leading. If there is any issue on any of it, I will sustain the objection.

Mr. Foster: I think it is an improper method of proof. The witness has read the patent and he could answer the general question first put to him to disclose the device there described, without putting the language of the claims in his mouth.

The Court: Objection sustained.

Q. By Mr. Mellin: All right. Mr. O'Neill, will you take from that patent and from the description of the drawings and describe the apparatus therein disclosed and its mode of operation and the results it was intended to produce? [306]

A. This device for testing an oil well is composed of two packers which are spaced apart, maintained in their spacing by plates between the packers. There is an opening for the fluid to be let into the tube on which the packers are mounted.

This device does not intend to trap a sample as far as I can determine, to bring the sample out as entrapped, but the sample would be taken in some other way.

Q. What is the function of the packers B?

A. The function of the packer B at the top and B at the lower end, the upper packer to hold up the hydrostatic head above that packer and prevent its access to any point below that packer. In other words, to pack off the annulus between the body of the tool and the wall of the well.

Q. What about the lower packer B?

A. And the function of the lower packer is to pack off in that position anything that is below the lower packer to prevent the fluid from below the lower packer, while

(Testimony of Frank E. O'Neill)

the top packer prevents the fluid from above the top packer entering the zone in between the packers in which it is intended to take the test, as the patent reads, "from siphon L."

Q. And what are the conditions of these packers when they are lowered into the well bore, Mr. O'Neill?

A. They are unexpanded. [307]

Q. And what is their condition in the well bore when the tool is to be operated?

A. The packers are expanded to fill the annulus and press against the wall of the well.

The Court: By "wall of the well" do you mean the interior of the casing or would it be so whether there was a casing or not?

The Witness: Well, I believe, sir, it would be in either case. It would operate either way, whether there was casing in the well or not.

The Court: It would be intended to by this patent.

The Witness: Yes, sir.

Q. By Mr. Mellin: Now, will you turn to the Franklin, patent, Letters Patent No. 263,330, patent issued August 29, 1882, and tell us, please, briefly, what that device is?

A. The device is entitled: "A device for regulating the flow of oil wells."

Mr. Foster: Is that the complete title? Are you quoting there?

The Witness: "Controlling and regulating the flow of oil wells." It is composed of a rotary type of valve which is adapted to be operated from the surface of the well.

Q. By Mr. Mellin: In what fashion?

A. Surface of the ground.

(Testimony of Frank E. O'Neill)

Q. In what fashion, Mr. O'Neill, is that valve to be [308] operated?

A. It is rotated in one direction.

The Court: By rotating the pipe?

The Witness: By rotating the tubing or pipe, sir, at the surface in one direction to operate the valve, and in the opposite direction to close the valve.

Q. By Mr. Mellin: And does this patent teach you the use of a packer below that valve to divide the well bore into an upper and lower zone?

A. The patent doesn't show such a packer but the patent, the language says that it is adapted to be run above a packer.

Q. Is this, in your opinion, in your opinion is this device capable or incapable of taking a sample of fluid from a well casing?

A. This device is capable of taking a sample of fluid from the well casing.

Q. And removing it from the well?

A. Removing it from the well, yes, sir.

The Court: Where would the sample come from? The bottom of the well?

The Witness: It would come from below a packer which would be placed below this device. It would be used in conjunction, sir, and would take it—would merely serve as an entrance valve and trap valve both, for the fluid below [309] the packer.

The Court: You would set a packer below the valve and cut off the hydrostatic head and then presumably the pressure of the formation fluid would cause it to rise through the tubing and through the valve, if open, up to the surface?

(Testimony of Frank E. O'Neill)

The Witness: That is correct, sir, or up to where the pressure would bring it.

The Court: Or it could rise above the valve and then the valve could be closed and the tubing and valve removed from the well?

The Witness: That is correct.

The Court: In that way you could trap the sample?

The Witness: Yes, sir.

Q. By Mr. Mellin: I hand you a model which is labeled "Franklin Device, Letters Patent No. 263,330," and ask you if that, on a small scale, accurately represents the disclosures of the Franklin patent?

A. This model has with it a packer—

Q. As taught in that patent, Mr. O'Neill?

A. Which is mentioned in the patent but which is not shown in the patent drawings. From the packer up the model is exactly like the drawing shown in the patent.

Q. And then the upper part of it is the valve above the packer? [310]

A. The valve is above the packer and this represents the connection to the tubing above it, this collar, so a tubing may be connected above to reach to the surface of the well, while between the packer and the bottom of this tapered member, which is shown here as B in the patent, there is a connection for tubing to go to the packer and then from there down tubing if needed.

Q. And then by rotating the collar up at the top of the device a partial turn in one direction you open the valve?

A. That is correct.

Q. And a partial turn in the opposite direction you close the valve?

A. That is correct.

(Testimony of Frank E. O'Neill)

Q. So that a sample may be removed to the surface?

A. That is correct, sir.

Mr. Mellin: I offer the model in evidence as Plaintiff's Exhibit 20.

Mr. Foster: May I ask, your Honor, whether or not the model is to scale with the drawings of the Franklin patent?

The Court: You may.

The Witness: The model was made from the drawings and by proportional measurements. I didn't have the dimensions from which I could make a scale model as to so many inches, but by taking the proportion to the tube and proportion to the housing of the valve the model was so constructed. [311]

Mr. Foster: In other words, the patent drawing of the Franklin patent was used as a working drawing and you just increased the scale somewhat but kept all the dimensions in proportion in building the model?

The Witness: That is correct, sir.

The Court: Is there an objection?

Mr. Foster: The model, I notice, has a collar at the top which is not shown in the patent drawing.

The Witness: You are quite right about that, Mr. Foster. The collar at the top is not shown in the patent drawing. It was put on there with the idea that tubing could be so connected.

Mr. Foster: The objection, then, is it is not a duplicate of the device illustrated in the Franklin patent, your Honor.

The Court: Will you show me the collar?

The Witness: It is the member that is screwed to the top of it.

(Testimony of Frank E. O'Neill)

Mr. Mellin: Let me have the collar. Let the record note that the witness removed the collar and has now changed the device offered in evidence as Plaintiff's Exhibit 20.

The Court: The collar is merely a connecting link in the pipe or tubing, is that it?

The Witness: That is correct, sir, just to connect the suspended tubing to it. [312]

The Court: It has an interior thread by which it can be joined to another tubing—so the ends of two pieces of tubing or pipe can be joined together?

The Witness: That is correct.

Mr. Foster: Are there any other additions or omissions as regards the model with respect to the device illustrated in the Franklin drawing?

The Witness: I mentioned the packer, sir.

Mr. Foster: Yes.

The Court: Is that all? Let the record show the collar has been removed and the witness has exposed the threads at the top end of the tubing. Is that correct?

The Witness: That is correct. The threads are shown at the top end of the member A-prime in Figures 1 and 2, both.

The Court: Of the Franklin patent?

The Witness: Yes, sir.

The Court: Exhibit 17-B for identification.

The Witness: Exhibit 17-B for identification, yes, sir.

The Court: Objection overruled and the model of the Franklin patent will be received in evidence and marked Plaintiff's Exhibit 20.

(The model referred to was marked Plaintiff's Exhibit 20, and was received in evidence.)

(Testimony of Frank E. O'Neill)

Q. By Mr. Mellin: Do you know of your own knowledge, [313] Mr. O'Neill, whether or not a device constructed in accordance with this Franklin patent, that is, in accordance with the drawings and teachings of the Franklin patent, as this model was made, if a full size device was ever manufactured? A. Yes.

Q. And that was manufactured by whom?

A. By the M. O. Johnston Company, the plaintiff here.

Q. And to your knowledge was that tool operated to obtain a sample in a deep well bore?

A. It was operated to obtain a sample. I was not personally present at the test but I was in supervision of the work at the time and it was operated to obtain a sample. [314]

Mr. Foster: I move to strike all of the testimony of the witness with respect to any operation of the test on the ground it now all appears to be hearsay.

The Court: Were the tests taken under your supervision?

The Witness: Yes, sir. I was general manager at the time, supervising the work and had the model constructed.

The Court: When was the test taken?

The Witness: The test was taken in about 1934, your Honor. I can fix the date because it was taken prior to a patent suit between the Johnston people and the Halliburton people. The test was run for one of the oil companies and accepted and paid for.

The Court: In the course of your business?

The Witness: In the course of business, yes, sir.

Mr. Foster: I move to strike that also, your Honor. I think we are entitled to have presented here the wit-

(Testimony of Frank E. O'Neill)

nesses who made the test, so that we may cross-examine them. It is all clearly hearsay so far as Mr. O'Neill is concerned.

The Court: The motion is granted.

Q. By Mr. Mellin: Will you turn to the McGregor patent, Mr. O'Neill?

The Court: Both motions are granted.

Q. By Mr. Mellin: (Continuing): That is Exhibit 17-C, for identification. A. Yes, sir. [315]

Q. And tell us briefly what type of device is disclosed there.

Mr. Mellin: Your Honor please, so that I understand the court's ruling, all of the testimony with respect to the Franklin tool was stricken?

The Court: No, with respect to the test.

Mr. Mellin: Yes, but not the testimony with respect to the fact that he knew of his knowledge that such a tool was built?

The Court: Mr. Foster's motion was really two motions. He directed it to two separate portions of the witness' answer with respect to the test, so to have the record clear I said both motions would be granted. The intention is to strike the testimony relating the facts of the test with the Franklin device and the result of the test with the Franklin device.

Mr. Mellin: Yes.

Q. By Mr. Mellin: Now, the McGregor patent, No. 582,828, patented May 18, 1897, that is Exhibit 17-C, for identification, will you briefly tell us what that device is?

A. It is a device for securing materials and objects from subaqueous bottoms.

(Testimony of Frank E. O'Neill)

Q. What does the drawing show in respect to the subaqueous bottoms? Does it show it as a bore into the earth?

A. Yes, the device actually was designed to be run into core drilling holes, in which there was fluid for the purpose, [316] the primary purpose of recovering from the bottom of the core drilling holes the diamonds which were lost from the diamond drill.

Q. The general device is a tubing E, is it?

A. The device itself is marked F in Figure 2 of the drawing, and is spoken of or described in the patent as a lifter, and it is connected to the bottom of a string of tubing.

Q. Large E, in Figure 1?

A. Large E in Figure 1, by a connector at D. The device assembled is lowered into the well. In the assembly is included a ball valve shown in Figure 2, marked at little f.

Q. Is that a downwardly seating ball or an upwardly seating ball?

A. It is a downwardly seating ball, and the device is sealed on the bottom by a frangible member shown at G.

Q. What condition is the interior of the pipe E or the device in, when it is lowered into the bore? Is it empty or full?

A. It is empty. The sealing member—

Q. Well, now,—go ahead. I didn't mean to interrupt you.

A. The sealing member G prevents fluid from entering, and the pipe E, as it is lowered into the bore, has atmospheric pressure. [317]

(Testimony of Frank E. O'Neill)

Q. What is the condition of the bore surrounding the tubing when it is lowered into the bore? Is it full of fluid or not?

A. It is full of fluid, as illustrated at B in Figure 2.

Q. Now, when the device has been lowered to the bottom of the well and you desire to open the device, how do you then proceed?

A. The device is lowered until it is almost at the bottom of the well. Then the tubing is dropped, permitting the frangible cover G to be broken. At that time the hydrostatic head of fluid in the well would rush in through the broken cover, lifting the ball f—that is small f—and proceeding on into the tubing, sweeping with it—it would come in with such force and velocity that it would sweep with it the diamond shown at C in the bottom of Figure 2, sweeping it in past the ball, where it would be trapped for removing it from the hole.

Q. Then the device is lifted out of the hole, is it?

A. The device is removed from the hole.

Q. And in that respect in what function does the ball valve f act?

A. The ball valve f acts to prevent the fluid leaking out of, or the diamond, rather, coming out of the bottom of the lifter as the tool is being removed from the hole. [318]

Q. Will you turn to the Cooper patent, No. 1,000,583, patented August 15, 1911, and tell us briefly what that patent discloses with reference particularly to the disclosure of the packer therein? Tell us what type of packer is disclosed, if one is disclosed in the patent.

A. The patent is for a packer for operating gas, water and oil wells. The type of packer is what is known

(Testimony of Frank E. O'Neill)

as an inflatable packer. In other words, it is a hollow sleeve, into which fluid may be placed or allowed to go by means of a tube shown at 8 in Figure 1. Fluid may be poured into that and inflate the packer. The purpose of the packer is the purpose of all the packers, which is to pack off the hydrostatic head from the test area.

Q. Now, will you turn to the Cox patent, Exhibit 17-E, for identification, and tell us briefly what that device is.

A. The Cox patent is a device for testing wells for oil or gas, and so forth, and it employs a packer.

Q. Is that the packer 9? Wait a minute.

A. No, it isn't 9.

Q. 10? A. 10 is the packer, shown in Figure 1.

Q. What type, general type of packer is this?

A. That is on the order of a straight wall packer.

Q. Is that operable to pack off in casing or not?

A. Well, it would be difficult to use that packer in [319] casing without some support below it. This packer is adapted to be dropped against the bottom of the hole, and collapse the packer, allowing the perforated member 8, as the packer collapses upwardly, to break the frangible disk at 13a, which seals the tool as it goes into the well, and the perforated member then passing through the disk plunges into the formation at the bottom of the well, from which it takes its sample. The packer would be difficult—it could be used at the very shoe of the casing, if you had formation immediately below the bottom of the shoe that you are going to test.

Q. Is this device intended to entrap a sample?

A. Well, I think it was intended to entrap a sample, sir.

Testimony of Frank E. O'Neill)

Q. What does the patent say is the function of valve 15?
A. The valve 15 is for entrapping the sample.

Q. For removal from the bore?

A. For removal from the bore.

Q. Now, will you turn to the Edwards patent, No. 1,514,585, Exhibit 17-F, for identification, and tell us what type of device is there disclosed?

A. The Edwards device is a device for testing oil wells.

Q. Does it or does it not include a packer?

A. Yes, it includes a packer shown at 5 in Figure 1. [320]

Q. What type of packer is shown?

A. The type of packer that is shown is on the order of a hook wall casing packer, employing a sleeve, a rubber or resilient sleeve instead of the individual rings as are so frequently used today.

Q. Does it employ slips or not?

A. Yes, there is a slip shown just below the packer 5. I don't see a number for the slips, but just below the packer 5 there is shown, at the exterior of the drawing, a tapered member, and just below that a member that shows dots. It looks like little dots on there. Those are slips. The tool was intended, I believe, for setting in formation. It shows the slips, however, as could be used for casing.

Q. Is that a device for testing wells, Mr. O'Neill?

A. It is, sir.

Q. Now, will you turn to the Mims patent, No. 1,582,84, issued April 27, 1926, and tell us what that discloses, please?
A. 17-G, sir?

(Testimony of Frank E. O'Neill)

Q. Exhibit 17-G, for identification, yes.

A. It is a patent for a method and means for perforating well casings.

Q. And the device that is disclosed in the drawing, will you please explain that to us, and explain the manner in which it is lowered into the well, and the general manner in which the exploding of the cartridges or the powder charges [321] is effected?

A. Well, the device is shown in Figure 1 as it would be lowered into the well.

Q. How is it lowered into the well?

A. By the cable.

Q. 20?

A. The cable 20, and along beside the cable 20 is an electric line 15 for electrically firing the apparatus when the operator is ready to fire.

In Figure 2 the device is shown with the ring 18, to which the cable 20 is attached in order to lower the device into the well, and at 15 again is shown the end of the detonating, or, the electric wire that goes to a detonating charge within the member 17, which is the plug screwed into the device, and which has the ring, supporting ring, attached to it or integral with it.

Below that point we find the projectiles 8, the barrels 10, and the sliding blocks back of the projectiles at the center of the tool marked 11, and in between those the powder charge to drive the projectiles out at 13—apparently the number is 13—so that when the connection is made through the electric wire 15, the detonating charge and the explosive charge will be exploded, the block will be driven outwardly, thrusting the bullets out of the barrel, and as the blocks pass the ports shown at 19 and

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complete their travel, the [322] excess of gas is pushed out through those ports, apparently.

Q. Now, in Figures 4 and 5, is that the same, or a similar, or different construction?

A. It is a different construction in Figure 4, in that they don't use the sliding blocks. There the device is adapted to be lowered on a line again, and at 30 and 31 we have a packing arrangement, packing gland through which the electric wire to be connected into the detonating charge at 29 is run, and we have the powder charge shown at 25, the bullet shown at 26, and the barrel is at 24. That performs the same function as the device above. It is just a different form of it.

Q. Now, the gun shown in this Mims patent is intended to be lowered into the well bore on the lower end of a cable, and after it is in place, detonated to drive the projectiles through the well casing into the formation?

A. That is right, sir. [323]

Q. Will you turn to the Steel patent, No. 1,602,864, Exhibit 17-H for identification, and tell us briefly what that device is?

A. That is a device for testing or operating oil wells which involve a packer.

Q. What number is that?

A. Shown at Figure 2 in Figure 2. Wait a minute. I am sorry, sir. It is actually shown at 5 in Figure 2 and 5 in the same number, Figure 1. It is an inflatable type of packer.

Q. And the purpose of the packer is what?

A. To pack off the hydrostatic head above the point at which it is desired to test and in this device, the language of the patent, does not confine the device to one

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packer but the patent says that they may use as many packers as they need to pack off where it is desired, so it could be used as one, two or more packers if desired.

Q. Now, will you turn to the Irwin patent, No. 1,652,472. That is Exhibit 17-I for identification. And tell us briefly what type of device is there disclosed?

A. That is a device for obtaining samples of fluid and for determining the point of fluid entry in a well—finding leaks in well casings.

Q. Is this device to be lowered in on tubing or is it to be lowered in on a line? [324]

A. This device is lowered in on a line.

Q. Will you state whether or not it has any packer on it or packers?

A. Yes. It has packer members at 17 shown in Figure 1. That is two packer members above and 2, 17, packer members below, and in between those packer members it has a perforated tube for permitting fluid to enter from the zone between the packer members.

Q. What is the ordinary term applied in the oil fields to the type of packer shown here—that is where you have packers spaced apart to have an isolated zone between the packers?

A. Well, that packer member in the oil field would probably be referred to as a swab rubber.

Q. I don't mean that. I mean where you have space packers apart. A. Straddle packers, sir.

Q. And the meaning of that is to straddle some opening or perforation, that is, to isolate them from above and below the packers?

A. That is correct, to pack off below and also above a zone to be tested or spot to be tested.

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Q. Now, will you refer to the Harris patent, No. 2,683,303, 17-G for identification, and briefly tell us what that device is? [325]

A. The Harris patent discloses a device for testing oil and gas wells.

Q. Is it the type of device for flow testing or taking a sample?

A. It was intended to take a sample. It contains or embodies a packer shown at 6 of the Cone type, to be seated on the shoulder in the well bore shown at 8, to pack off the hydrostatic head above the packer.

It contains a perforated anchor below, shown at 10. The perforation is shown at 11, and the device is adapted to be run—

Q. Is the lower end of the device in open or in closed condition when it is run into the well?

A. It is to be adapted to be run in closed.

Q. And how is that closure effected?

A. By a frangible cap, shown at 18, which is held in place by a member, 19.

Q. And in that—when that enclosure is employed what is the condition of the interior of the tool or tubing above it? Is it full or empty?

A. It is empty. It is at atmospheric pressure.

Q. And now will you explain to us how, if the seal, 8, is ruptured the sample is admitted into the tubing?

A. Well, the seal is broken or ruptured by dropping the member shown in Figure 1 as 22, which is a form of go- [326] devil that is used in the field. That passes down through the empty pipe and strikes the disc.

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Q. Disc 18?

A. 18; and fractures the disc to permit the fluid from below to enter into the low pressure chamber above.

Q. Now, I notice a ball valve, 23, in Figure 3. What is the function of that ball valve or the intended function of it?

A. The intended function of the ball valve at 23, is to be dropped in at the conclusion of the test to trap the sample obtained within the drill pipe or tubing.

Q. And when is the ball valve put in place? Before or after the sample has entered the tubing?

A. After the sample has entered the tubing.

Q. And it seeps downwardly, does it?

A. It seeps downwardly.

The Court: In other words, they drop the go-devil, 22, down through the pipe and it breaks that frangible covering 18?

The Witness: Yes, sir.

The Court: And the sample presumably enters?

The Witness: Yes, sir, it enters.

The Court: Enters through the opening in the tubing?

The Witness: That is correct.

The Court: And after, presumably, enough fluid has [327] entered to make the test whoever drops the go-devil then drops the ball bearing and closes the valve?

A. That is correct.

Q. Drops it from the surface down through the tubing and presumably it lodges in the opening through which the fluid entered?

A. There is a tapered member shown at 13 in which the ball valve would seep down. The ball valve, according to the wording of the patent, is preferably coated with

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something like tar or something of the kind, but it is still a ball valve and is dropped for that purpose.

Q. By Mr. Mellin: Now, will you turn to the Burstall patent, No. 1,710,203, April 23rd, 1929, 17-K for identification.

A. Yes.

Q. And tell us what that patent discloses.

A. That patent discloses in Figure 1, a hook wall packer with slips and bow springs on it and the packer, while it shows just one packing member marked B in Figure 1 and B in Figure 2, it is a flexible or resilient member which is adapted to be pressed between the plate 2, the upper member 2, and the lower member b.

Q. How is this member expanded, Mr. O'Neill?

A. The slips shown at 14 in Figure 1 are released by a turn. For instance, the pin at Figure—as shown at 11 in [328] Figure 1 would be within the hook at 13 as the tool was run into the well, and by a turn the pin is turned out of that hook and by lowering the device then the slips have been released so they may take hold of the pipe and the pressure down from above the pipe against the resilient member, which is held from moving downwardly by the slips, expand the resilient member.

The Court: A telescoping arrangement whereby the portion above B can telescope into the portion below?

The Witness: Yes, it is a telescoping arrangement.

The Court: Tapered and telescoping arrangement?

The Witness: It is tapered where it contacts the resilient member and the telescoping member passing from the top member, rigidly attached to the top member, and passing down through, with respect to the lower member below the resilient member B, so that pressure from above would cause the upper member, which is marked 2, along with its sleeve, which is attached at the thread 4

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in Figure 2. And which is shown as 5 in Figure 2, to move downwardly with respect to the member which is shown as small b on the right-hand side of Figure 2.

The Court: It would be akin to mashing a rubber ring flat, around rubber ring flat?

The Witness: Yes, sir, it is almost what it is, too.

Q. By Mr. Mellin: Now, does that packer have the same [329] or a different function than the packer used by the M. O. Johnston Company in its well tester?

A. Well, that has the same function, to pack off the hydrostatic head above from the test below.

Q. How does it compare in mode of operation?

A. But it operates just the same way as a casing packer does, by rotation of the tubing to unlatch the slips.

Q. Now, will you refer to the Johnston patent No. 1,790,424, 17-L for identification? A. Yes, sir.

Q. Tell us generally what that device is?

A. That is a device for testing oil wells.

Q. And by testing oil wells will you state whether or not it is a device for testing oil wells by obtaining and removing a sample of fluid from the formation to the top of the well?

A. It is, sir. The device is adapted to be lowered in on a tube, shown at B in Figure 1 at the top of the figure. It contains a packer, shown at O in Figure 1. It has a shoulder in the well bore, shown at A little zero—it is marked Ao, whichever you want to call it, in the figure. And the packer is adapted to be set on the shoulder to pack off the hydrostatic head above that shoulder from having access to the zone below the packer and by a downward movement of the drill pipe to open

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the valve shown at [330] E, which is an upwardly seating valve, seating against the member M, in order that fluid from below the packer may enter through the ports marked little d1. d1 is shown at the lower left side of Figure 1.

The mandrel to which the valve head E is attached is marked capital D-1. The fluid enters the ports at small d-1, and passes upwardly into the tubing and at the conclusion of a test, by lifting on the tubing at the surface of the well, the tubing B, the valve member is pulled upward, assisted by the spring R, that large coil spring in the upper portion of the drawing, and is pulled against the seat M to close the tool following the test and to thereby entrap the sample.

The Court: That is an upwardly closing valve?

The Witness: Yes, sir, it is an upwardly seating valve.

Mr. Mellin: The valve in the present Johnston tester is also an upwardly seating valve?

A. That is correct, sir.

Q. And the function of the valve in this patent, as you have just described generally, that is, it is an upwardly seating valve through the relieving of the weight on the drill pipe at the surface?

A. That is correct.

Q. And to rap a sample?

A. That is correct, sir. [331]

Q. Now, will you turn to the Rembert patent, Patent No. 1,835,722, December 8th, 1931, 17-M for identification. And will you briefly tell us the manner in which—the purpose of that device and the general manner in which it is constructed and functions?

A. The Rembert device, this patent discloses a casing perforator for oil wells. It has a trigger member by

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which—I said “casing perforator”. I should have said casing gun perforator. It has a trigger member by which the projectiles may be fired.

The trigger member is shown in part in Figure 1 at 25, which is a vertical rod from which, shown in Figure 2, there is a plate, 28, disposed angularly—not quite horizontally, from the rod.

The Court: Which part of the figure is that shown in?

The Witness: That, sir, is the central circle. Not the little circle. The little circle is the rod 37, but the large central circle just at 28.

The Court: I see it now.

The Witness: That is the disc and in the disc is cut a slot marked 34, which slot is adapted to receive the rod 37.

The device contains gun barrels at 16 in Figure 4, screwed into the body, which is shown at 11 in Figure 1; and I don't know whether the number is repeated in Figure 4, but [332] it is the large outside cross hatched area there. The body has curb sides with rollers mounted on them as at 13 and 14, and flat sides as at 12 in Figure 4.

And the gun barrel is adapted to receive a cartridge, fixed ammunition as shown here at 15 in Figure 4.

The trigger rod shown back at 25 in Figure 1, carries on the detent pins, which possibly could best be seen in Figure 6, which is another form of device. In other words, the first form showed only the one gun barrel while Figure 6 shows the possibility of using multiple gun barrels and in the firing the hammer which fires the gun would be shown in the same Figure 6 at 21-a.

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It is a spring device which is held in a cocked position by virtue of the detent pins attached to the trigger rod and shown at 24-a in the Figure 6.

In Figure 5, near the lower part of the figure and immediately behind the projectile 15 or the cartridge 15, is shown a firing pin, a little plunger.

The Court: Is that 19?

The Witness: At 19, sir. It is adapted to be struck by the hammer or the spring hammer at 21 and driven into the percussion cap in the cartridge shown, the cartridge 15. I am not sure I have a number for the percussion cap but it would be in the back end of the cartridge 15. And in that way to explode the powder charge and drive the projectile [333] out horizontally against the casing.

The thing is operated by, returning now to Figure 5, lowering a weight down against the plate 28 as shown here. He shows a slot 34 marked and the plate 28 on the left marked, so that when the weight reaches 28 that portion of the trigger mechanism would be depressed, causing, by virtue of the pivot shown at 33 in Figure 5, causing the portion of the trigger mechanism marked 25, to be raised and thereby removing the detent pin 24, from in front of the hammer and permitting the hammer to fly forward and strike the plunger for exploding the cap.

Q. By Mr. Mellin: How is the device suspended in the well bore?

A. The device can be—may be suspended in the well bore either by a line or tubing. The language of the patent tells that the device is adapted to be lowered into

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the well casing in any suitable manner by means attached to rod 37 or otherwise.

Q. Now, will you turn to the Miller patent, No. 17-N for identification, No. 1,837,788, December 22nd, 1931, and tell us, generally, what type of device is there disclosed?

A. The device there disclosed is an oil well testing device.

Q. For what type of testing, Mr. O'Neill? [334]

A. For testing, this identical one here, for testing in formation. It shows a shoulder packer for setting and rat hole tester.

Q. What is the purpose of the packer—is that the packer, 21?

A. The packer is at 21.

Q. That engages what?

A. That packer is held from downward movement by the plate 17 which in turn rests against the shoulder within the well bore shown at 18. This is in Figure 2. And the weight of the pipe, 10, is transmitted downwardly to the upper retaining member of the packer 16, causing the packer to be compressed longitudinally and to be expanded laterally and pressed against the wall of the well.

The Court: Would you call that a conical packer?

The Witness: This isn't a conical packer. Possibly I said it was conical, but really it isn't. It is more of a straight wall type of packer, sir. He is not setting the resilient member against the shoulder. He is setting a member, a steel member, 17, against the shoulder and expanding the packer actually above the shoulder, so it is more of a straight wall type than a conical type.

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Q. By Mr. Mellin: Now, will you turn to the Johnston patent, 17-O for identification, issued January 19th, 1932 on an application made June 19th, 1931, and tell us generally [335] what type of device is there disclosed?

A. That is a device for formation testing of an oil well by means of a packer and a valve to entrap a sample in the tubing so that the sample may be withdrawn for examination.

Q. Does it include an upwardly seating valve for entrapping the sample?

A. Yes, it includes an upwardly seating valve shown at—

Q. And what is the purpose of packer 9?

A. I am sorry, I did not hear your question.

(Question read.)

A. The packer 9 is for the same purpose that I have recited for packers before, for packing off the hydrostatic head above the packer and preventing that from having access to the rate hole shown at 6, so that it could have access to the tool itself and to prevent the hydrostatic head from having access actually to the testing device.

Q. Will you state whether or not the rat hole is part of the well bore ordinarily?

A. Yes, definitely is a part of the well bore.

Q. Now, in what fashion was the instrument by which the valve generally, indicated at 35 and with the operation 37, is operated in order to admit fluid to the tool and to entrap fluid into the tool above the valve? [336]

A. By manipulating the pipe above it by lowering it down and raising it up.

Q. That is the tubing 45?

A. Tubing 46 it seems to be.

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Q. Yes, 46.

A. 45 is just a collar connecting.

Q. Now, what is the comparison between the function or the purpose of the valve, the main valve here or the valve 35 and its ports 37? And the seat 34? How does it function? And what is the purpose of the valve—compare the function and the purpose of the main valve with the present-day Johnston tester.

A. The function and the purpose are identical, sir.

The Court: How does it compare with the valve which you described in Exhibit 17-L for identification, which is the Johnston patent, 1,790,424?

The Witness: It is the same, sir. It is identically the same. The valve shown in this 1,790,424 is located below the packer but it functions identically the same.

Q. By Mr. Mellin: Now, still referring to—

Mr. Mellin: Did the court get the information it desired?

The Court: I take it you mean by that it operates in the same manner?

The Witness: Yes, sir. [337]

Mr. Mellin: Referring to Exhibit 17-O. There is an additional valve structure just above the packer. What is the purpose of that valve structure?

A. You are referring to the valve structure which is marked 24, 25 and 28?

Q. By Mr. Mellin: Yes.

A. In Figure 2?

Q. That is correct, yes.

A. The purpose of that valve structure was actually two-fold. One, to act as a by-pass valve in assisting—in getting the packer down and also to act as an equalizing

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valve for releasing the hydrostatic head from above the packer into the zone below the packer for equalizing the pressure above and below the packer so that the packer might be more readily removed from its seat at the conclusion of the test.

Q. And how does the purpose of this valve you just described in this patent 17-O, compare with the purpose of what you termed the equalizing valve in the present-day Johnston tester?

A. It is the same purpose, sir.

Q. Now, will you turn to the Fortune patent, Patent No. 1,853,557, April 12th, 1932, Exhibit 17-T for identification, and tells us generally what the device there discloses?

A. The device disclosed in the patent to J. C. [338] Fortune, that is, 17-T for identification, is a formation testing device for the purpose of running into a well, packing off the hydrostatic head of fluid above the zone to be tested, taking a sample from the zone to be tested, trapping the sample and bringing or removing it from the well for examination. [339]

Q. Will you state whether or not that device includes a packer?

A. It includes a packer shown at 11 in Figures 1, 2 and 3.

Q. And the function of that packer is what?

A. To pack off the annulus between the body of the device and the wall of the well in order to hold up the hydrostatic head and prevent the hydrostatic pressure being exerted against the formation being tested.

Q. Now, I refer you to the Johnston patent, No. 1,901,813, Exhibit 17-Q, for identification, and ask you if generally that tool functions in the same manner as

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the Johnston patent,—so far as the valves are concerned functions in the same manner as the Johnston patent, Exhibit 17-O, for identification,—generally?

A. Oh, yes, sir.

Q. Will you point out whether there is a difference in the construction of the equalizing valve?

A. Yes, there is a difference in the construction of the equalizing valve. It is for the same purpose. The equalizing valve structure shown in 17-O, for identification, and member 28 seats downwardly on to the member 21 to close the ports shown at 28. Did I say member 28, sir? I meant No. 25 seats downwardly on member 21 so as to close the ports 28, to prevent fluid from the annulus leaking through into the [340] test zone, and upon raising the tools at the surface, or, the tubing, that member is pushed off of the seat and does permit the fluid to come through to equalize, whereas in the—

The Court: Before you leave Exhibit 17-O, for identification,—

The Witness: Yes, sir.

The Court: —as to that valve, how is it originally opened, by manipulation of the tubing from the top?

The Witness: Yes, sir.

The Court: It is opened on the turning?

The Witness: No. This valve is opened, and by using this kind of packer it isn't necessary to turn. The turn is purely to set the slips on a casing packer.

The Court: How is the valve in Exhibit 17-O, for identification,—how is that equalizing valve opened originally?

The Witness: By just picking up on the tubing. It is manipulated by the tubing. It telescopes—

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The Court: Would it be opened, then, as the device is lowered into the well?

The Witness: Yes, sir, it could be. It would be opened by lowering into the well, that is correct. It would not have any effect on the valves above it. It would assist in fluid by-passing the packer in going into the well. The fluid would go into the ports at 12 at the anchor and up [341] through the packer, the mandrel in the packer which would come out at 28, through those ports, and assist in lowering the packer without too much compression. It would be open going into the well, sir.

The Court: It would be open in entering the well, and, of course, as the device is removed from the well, it would also be open?

The Witness: That is correct, sir.

Q. By Mr. Mellin: Will you refer to Figure 6 in Exhibit 17-Q, for identification, and I will ask you what is the element 38? A. Figure 6?

Q. It appears to be a packer?

A. It is a packer, sir.

Q. And how is that expanded?

A. That is just an expandable straight wall packer. By pressure from above, being lowered down onto the resilient member and the resilient member is held from moving downwardly by the member 39, so that the mandrel passing through the resilient member, which is the packer 38, telescopes downwardly and compresses the member, the resilient member, between an upper and lower plate, expanding it laterally.

Q. Now, will you turn to the Simmons patent, No. 1,930,987 of October 17, 1933, on an application filed

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February 10, 1926, and tell us what that patent discloses. [342]

A. 17-S, for identification, sir?

Q. 17-S, for identification, yes.

A. It discloses a method and apparatus for testing oil wells or gas wells or water wells.

Q. What type of test is intended to be taken by the Simmons tool? Is that supposed to be a flow test or a test by removing the sample from the well?

A. It is supposed to be a test that would take the fluid, whether it flows or not, and remove a sample from the well by packing off the hydrostatic head.

Q. Will you tell us by reference to the drawing how that tool is constructed and operates?

A. The tool in Figure 1 shows a cone-shaped packer at 15. In that figure the tool is shown partly in section and partly in elevation. Now, in the section, in the left-hand side of the Figure 1 we show an upper member which in Figure 2 is marked 19 and through which ports 17 pass. That upper member has passed through the member shown in Figure 2 as 4 now, with the stem 7, and the ports 5 and 6 in Figure 2. They are assembled together in Figure 1, and the ports are shown in alignment. The upper member 19 is adapted to rotate on the stem of member 4, that is, on 7.

Q. Mr. O'Neill, may I interrupt you there? Did you cause a model, a scale model, to be made of the tool shown in the Simmons patent? [343]

A. Yes, sir.

Q. Is this the one which I hand you?

A. That is right, sir.

Q. Does that conform to the disclosure of the Simmons patent? A. Yes, sir, it does.

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Q. And is that built in accordance with the drawings of the Simmons patents? A. It is.

Mr. Mellin: I will offer that in evidence as Plaintiff's next in order.

Mr. Foster: The collar isn't shown in the drawings, is it?

Mr. Mellin: Well, we will leave the collar on, and you can argue it.

The Witness: The collar is indicated in Figure 1 by broken lines, sir.

Mr. Mellin. It is offered in evidence.

The Court: Is there objection?

Mr. Foster: May we see that?

(The instrument was handed to counsel.)

Mr. Foster: No objection.

The Clerk: Exhibit 21 in evidence.

(The model referred was marked Plaintiff's Exhibit 21, and was received in evidence.) [344]

The Court: That is the model of the Simmons patent?

Mr. Mellin: That is correct.

The Court: Described in Exhibit 17-S, for identification?

Mr. Mellin: Yes, your Honor.

Q. By Mr. Mellin: Taking that model, Mr. O'Neill, and from the drawing could you show us how it functions, the device functions, to take a sample of fluid from a well bore?

A. The device is adapted to be lowered in on tubing or drill pipe, and the packer seated, in this particular type of packer, cone packer, seated on a shoulder within the well bore, and at that time, when it is desirable to take the test, after the hydrostatic head has been packed off

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and held up by the packer by rotation of the drill pipe in one direction to open the valve by aligning the ports shown there, as I mention, at 17 and at 5 in Figure 5, and also shown at 18 and at 6 in Figure 1, permitting the fluid from below the packer to pass through the ports so aligned, and into the tubing above and on up into the well tubing; and at the conclusion of the test to rotate the device in the opposite direction and throw the ports out of alignment.

The Court: Thereby, in effect, closing the valves?

The Witness: Thereby closing the valves to trap your sample, yes, sir.

Q. By Mr. Mellin: Is that valve opened to admit fluid [345] to the tool above the packer by means of manipulation of the tubing string on which the tool is suspended in the hole? A. It is, sir.

Q. And is that adapted to be closed to entrap the sample above the packer by manipulation of the tubing at the surface of the well? A. It is, sir.

Q. And state whether or not that packer is adapted to divide the well bore into an upper and lower zone?

A. It is, sir.

Q. Now, will you refer to the Johnston patent, which you have already identified as Exhibit 17-U, as corresponding with the device in suit, or the tester or apparatus in suit, and I want to call your attention particularly to Figures 4 and 5 and ask you what type of packer is there disclosed?

A. This is patent No. 2,073,107, sir?

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Q. Yes, sir. That is Exhibit 17-U, for identification, and referring to Figures 4 and 5.

A. Figures 4 and 5 both disclose a hook wall type, a hook wall casing packer of a by-pass type, a packer to be set in casing.

Q. Now, will you refer next to the Neitzel patent, reissue No. 16,991, originally filed April 18, 1927, and tell us what type of device is there disclosed?

The Court: What exhibit number is that? [346]

Mr. Mellin: That is Exhibit 17-V, for identification, your Honor.

The Witness: That is a device for testing formations in oil wells. It is equipped in the patent drawing with a conical packer marked 10, and with valve parts in Figure 1 marked 15 and at 14, which ports can be brought into registry by manipulation of the drill pipe, lowering it down against the packer, and which may be brought out of registry or closed by picking up on the packer.

The Court: By "registry," do you mean alignment?

The Witness: Alignment, yes, sir.

The Court: Does that take the sample from above the packer or below the packer?

The Witness: No, sir.

The Court: The fluid would probably rise in the inner tubing from the rat hole up through the valves, and then be admitted by the valves into the upper tubing?

The Witness: That is correct, sir.

The Court: Into the tubing above the valves?

The Witness: That is right, sir.

Q. By Mr. Mellin: Now, will you refer to the Macready patent, Exhibit 17-W, for identification, reissue

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No. 19,963, originally filed July 5, 1922, and tell us generally what type of device is there disclosed?

A. That is a testing device for oil wells. It is for [347] obtaining samples from oil wells.

Q. Now, referring you to Figure 15, and calling your attention particularly to the ball 33,—

A. Yes, sir.

Q. —what is the purpose and function of that ball?

A. That ball is dropped into the tubing at the conclusion of the test, with the idea of trapping a sample in the tubing.

Q. That is to seat downwardly, is it?

A. Yes, sir, it is a downwardly seating ball.

Mr. Mellin: Now, your Honor, the book of patents, Plaintiff's Exhibit 20,—

The Court: You mean Exhibit 17?

Mr. Mellin: —17—I am sorry—and each of the patents therein contained, Exhibits 17-A to 17-W, inclusive, are offered in evidence.

Mr. Foster: Some of the patents this witness has not referred to. They have not been identified.

Mr. Mellin: Which ones, Mr. Foster?

Mr. Foster: Well, 17-R.

The Court: Exhibit 17-R, for identification, is which patent now? That is Wells patent No. 1,926,017?

Mr. Foster: Yes, your Honor.

Mr. Mellin: Well, we will refer to that. I am sorry. I must have missed it in going through. [348]

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Q. By Mr. Mellin: Will you turn to Exhibit 17-R, for identification, and I will ask you to tell us what type of tool is disclosed therein?

A. That is a hook wall casing packer, sir, of a by-pass type.

Q. Is that generally of the type of packer which is used in the Johnston tester, as made today?

A. Of that general type, sir.

Q. That is a by-pass wall packer, yes.

Q. Will you refer to—I must have passed another one up here—the Johnston patent, Exhibit 17-T, for identification, No. 2,048,451, and I will ask you what type of device is therein disclosed.

A. That is a casing perforator gun, to be lowered in on a line and fired electrically.

Q. And its bullets propelled out of the gun into the casing by the admission of powder charges?

A. Yes, sir.

Q. How, in general type, does the gun therein disclosed compare with the general type of electrically fired guns used today, Mr. O'Neill, if you know? Do you know?

A. Well, in general, sir. The mechanical details of them I wouldn't know, but in general they are for the same purpose and operate in general alike. [349]

Q. In other words, is this the type of gun that has been referred to herein as a line gun?

A. Yes, it is a line gun.

Q. And the meaning of that is what?

A. That the gun is lowered into the well on a line or a cable instead of on tubing or drill pipe.

(Testimony of Frank E. O'Neill)

Q. And an electrical circuit is established through a conductor 14, that extends downwardly through the well bore to initiate the firing?

A. That is correct, sir. That serves as a lowering line and a firing line, both.

Mr. Mellin: The patents, Exhibits 17-A to 17-W, inclusive, your Honor, are offered in evidence under the same numbers they were offered for identification. [350]

* * * * *

The Court: I will receive in evidence Exhibits 17-A to 17-T, inclusive, and Exhibits 17-V and 17-W for all purposes offered.

(The documents and articles referred to were marked as Plaintiff's Exhibits 17-A to 17-T, inclusive, and Exhibits 17-V and 17-W, and were received in evidence.)

The Court: As to Exhibit 17-U for identification, that will be admitted for the limited purpose of illustrating the [365] testimony given by the witnesses Johnston and O'Neill.

If you desire to make further offer later you may do so.

(The document referred to as Plaintiff's Exhibit 17-U was received in evidence.)

Mr. Mellin: All right, your Honor.

Q. By Mr. Mellin: Now, Mr. O'Neill, will you refer to the Mims patent, No. 1,582,184, Exhibit 17-G for identification and to the Simmons patent, 17-S for identification, and tell us whether or not you can assemble them or connect them together so that they can be run into a well bore at the same time for operation?

(Testimony of Frank E. O'Neill)

Mr. Foster: That is objected to as immaterial. What the plaintiff is now attempting to do, your Honor, obviously is to have an expert with hindsight and a full disclosure of the patents in suit, mosaically pieced together in a manner suggested by none of these prior patents, elements from some of them to provide the device of the patent in suit.

The Court: He is asking him what is perfectly obvious. That is, from these models here whether you can screw one into the other—whether you can screw two pieces of pipe together is what it amounts to.

Mr. Foster: And whether or not he can do it now. We urge that as being immaterial. [366]

Mr. Mellin: That goes to the weight.

Mr. Foster: They have not proved it was done before our inventions and the fact they can do it now in the light of the disclosure of our inventions is immaterial.

The Court: Isn't it material to know whether or not it can be done and, secondly, how simply it can be done as indicating whether or not it is something new?

Mr. Foster: Not if it was all done after our inventions, your Honor. There is no suggestion here that this was done before our inventions and the fact that one can easily do it who is acquainted with the disclosures of our patents has nothing to do with the prior art or invalidating the patents. It isn't suggested this was done before our inventions. This gentleman is testifying about prior art and now Mr. Mellin is asking him to piece it together—to piece together the different patents in a manner suggested by none of them but obviously in the light of the suggestion of the combination of our patents. What materiality that has I cannot see.

(Testimony of Frank E. O'Neill)

The Court: Suppose someone invented the idea of putting a bucket on the end of a rope to bring water out of a water well and had it patented? Later someone thought of hooking the second bucket beneath the first bucket and thereby bringing up two buckets of water at one time and a patent was granted on that. As to the validity of the second patent [367] wouldn't it be material to inquire what was involved in the second operation, as to whether it was anything new and thus whether it constituted an invention?

Mr. Foster: Well, the newness I think is—that feature of the case, if this is all prior art that Mr. Mellin intends to introduce, that is answered by saying no one before Lane or Spencer did combine the separate elements into a combined tool such as they did.

Now, they are seeking through an expert who is familiar with our patents and our suggestions, to select elements from different prior patents, in a manner disclosed by none of them or contemplated by none of them, and combining them. There is lack of materiality for that reason and I urge my objection.

The Court: Objection overruled. You may answer.

Mr. Mellin: Will you read the question?

(Question read.)

A. Yes, sir.

Q. By Mr. Mellin: Will you tell us, please, the manner in which you would connect the two together so that they may be simultaneously run into a well bore and so that each could perform their separate duty, one of perforating and the other of testing the well? Did you make a drawing showing the manner in which you could connect them? A. Yes, sir. [368]

(Testimony of Frank E. O'Neill)

Q. And is this the drawing which I show you?

A. Yes, sir.

Q. Do you have an enlargement of that drawing?

A. Yes, sir.

Mr. Mellin: May I have this drawing marked for identification, please?

The Clerk: Plaintiff's Exhibit 22 for identification.

(The drawing referred to was marked as Plaintiff's Exhibit 22, for identification.)

Mr. Foster: I haven't, of course, seen it yet. Do you have a copy of it?

Mr. Mellin: No, I don't, but you will have one later on.

Mr. Foster: That is all right.

Q. By Mr. Mellin: Is this the enlargement that you referred to?

The Witness: Yes, sir.

Mr. Mellin: May I have the small drawing and the enlargement marked for identification, your Honor?

Mr. Harris: What will be the numbers on those, Mr. Mellin?

The Court: The small drawing has been marked Plaintiff's Exhibit 22 for identification, and the large one will be marked Exhibit 23 for identification. [369]

(The drawing referred to was marked as Plaintiff's Exhibit 23, for identification.)

The Court: That is a drawing of the witness' opinion as to how the Mims gun, depicted in 17-G, can be attached to the Simmons tester, Exhibit 17-S, is that correct?

The Witness: Yes, sir, that is correct.

(Testimony of Frank E. O'Neill)

Q. By Mr. Mellin: Now, from the drawings 22 and 23 for identification, Mr. O'Neill, will you explain to us, please, how you connect the two together?

A. (No answer.)

Mr. Mellin: If your Honor please, may the witness step to the enlarged chart?

The Court: He may.

A. The Simmons device is shown here.

Q. By Mr. Mellin: Just a moment, Mr. O'Neill. Does the drawing you made, except for the showing of a cable downwardly through the Simmons device and the changes necessary for that and the changes necessary to suspend the gun from it, conform to the drawings of the Simmons patent? A. Yes, sir.

Q. And does the drawing of the Mims gun at the bottom conform to the drawings of the Mims patent?

A. Yes, sir.

Q. All right. Now, from that point on will you explain, please, first, what you did—what it was necessary [370] to do in order to combine the two devices together, referring at any time to the teachings in the patents where you find that taught?

A. As far as the Mims gun is concerned no change was necessary in the gun. Mims in his patent showed how to suspend the gun and the gun could be merely tied by cable to the bottom of the Simmons device or it could be suspended rigidly if need be, but Mims shows how to tie it to a cable and suspend it from a cable. It could be suspended as well from the Simmons device.

Q. The Simmons device that you refer to is the device in Simmons patent, Exhibit 17-S? A. Yes, sir.

(Testimony of Frank E. O'Neill)

Q. Go ahead.

A. Then in order to connect the wiring, the Mims being electrically fired, to bring the wiring through where it may be fired from the surface it would be necessary to drill through the cap at the bottom of the perforated anchor of the Simmons device and also to drill a hole through the central stem of the Simmons device through which the wire would be threaded, and to install packing glands to prevent leaks. That way the wire would be brought on up to the surface.

Q. Now, what change had to be made—point out precisely the change that had to be made in the Simmons device or the device in the Simmons patent, in order to connect the [371] two together. As I understand it, you first referred to drilling a hole through the lower end of the cap at the lower end of the perforated anchor?

A. That is correct.

Q. And then drilling a hole upwardly through the center of the stem of the Simmons tool, is that correct?

A. That is right, sir.

Q. Then I notice that you put packing at each end of that hole. What is the purpose of that and why is that there?

A. To prevent leakage of fluid from above the packer into the test zone.

Q. Then I notice that you have the cable or the electrical conductor passing out through the side of the collar at the top of the Simmons device?

A. That is right, sir.

Q. And that the collar which is shown in the patent in the dotted lines—

A. At 23, as I recall the number.

(Testimony of Frank E. O'Neill)

Q. 23? A. I haven't it before me.

Q. And I also notice you have packing there to prevent leakage, is that so?

A. To prevent leakage from the drilling fluid into the tool above the valve. [372]

Q. Now, that main valve, is that described? Will you state whether or not that is described by Simmons to admit fluid upwardly through the tool and through the packer into the tubing when it is opened?

A. That is correct, sir.

Q. And that valve also has the purpose of being closed so as to entrap the sample which had been previously obtained in the tubing above the packer and above the valve? A. That is right, sir.

Q. Now, please describe to us the operation of this assembled Mims gun and Simmons tester, briefly?

A. The two devices so assembled would be lowered into the hole, lowered by means of the tubing and the electric line played out from the surface as the device is lowered until such a time that we reach the point where we wish to fire the perforator, and at that time, by closing a switch on the surface, the electrical energy would be furnished to the Mims gun to fire the projectiles. If a test is desired the packer could be set, the packer shown is a packer for a rat hole or shoulder, the packer set and you take your test in a normal manner, rotating the tubing at the surface to open the valve and rotating it in the opposite direction to close the valve and trap the sand.

Q. As a matter of fact, in making a casing test, to test above the gun, would you use a conical packer such as is [373] shown in Simmons?

A. No, not for a casing test.

(Testimony of Frank E. O'Neill)

Q. You would have applied some other packer, would you, or not?

A. Yes, sir, I would have applied some other packer, either a hook wall packer, possibly a regular casing packer could be used.

Q. Now, in your opinion, Mr. O'Neill, would a combination of the Simmons tester and the Mims gun be operative when assembled as you have shown, an operative structure? A. Yes, it would be operative. [374]

* * * * *

Q. Mr. O'Neill, with reference to the drawings, Plaintiff's Exhibits 22 and 23, for identification, showing the Mims gun combined with the Simmons tester, will you state whether or not there is any modification of the operation of the Simmons tester by such combination or connecting together?

A. None whatsoever, sir.

Q. And is the operation of the Mims gun modified or changed in any manner because of its connection with the Simmons tester? A. Not at all, sir.

Q. Is there any co-operation between the two, that is, is there any intermutuality of operation of the two, other than being run into the hole and removed from the hole together? A. That is all, sir.

Q. When that assembled tool is run into the hole, the gun performs its separate function in perforating does it not? [375] A. Yes, sir.

Q. And the tester performs its same old function of testing? A. That is correct, sir.

Q. And neither one is modified by the operation of the other? A. That is right.

(Testimony of Frank E. O'Neill)

Mr. Mellin: I offer the drawings, Exhibits 22 and 23, for identification, in evidence to illustrate the witness' testimony.

The Court: Plaintiff's Exhibits 22 and 23, for identification, are received in evidence.

The Clerk: So marked.

(The drawings, heretofore marked Plaintiff's Exhibits 22 and 23, for identification, were received in evidence.)

Q. By Mr. Mellin: I hand you copies of the patents in suit and of the prior art. Mr. O'Neill, copies of the exhibits.

The Court: That is Exhibits 1 and 2 and 17?

Mr. Mellin: That is right, your Honor.

Q. By Mr. Mellin: Mr. O'Neill, in your opinion was the problem presented to you of connecting the Simmons tester and the Mims gun one which you solved by means of your mechanical skill?

Mr. Foster: That is objected to as uncertain and indefinite [376] as to what is meant by "mechanical skill."

The Court: Sustained in that form. He may state how he did it.

Q. By Mr. Mellin: Mr. O'Neill, will you state whether or not it required any experimentation on your part to combine the Mims gun and the Simmons tester?

A. No. it was just hooking them together.

Q. Now, will you turn to Exhibit 1, which is the Lane patent in suit, and I have before you on the easel an enlargement of the drawing of the Lane patent. You have examined it, haven't you?

A. Yes, sir.

(Testimony of Frank E. O'Neill)

Q. And it is an exact duplicate of the drawing of the Lane patent except it has been enlarged?

A. It is just an enlargement.

Mr. Mellin: May I have that marked, for identification, your Honor?

The Clerk: 24, for identification.

(The enlarged drawing referred to was marked Plaintiff's Exhibit 24, for identification.) [377]

Mr. Mellin: May I offer it in evidence as Exhibit 24?

The Court: It is an enlargement of the drawing which comprises a part of the plaintiff's Exhibit 1, is that correct?

Mr. Mellin: That is right, yes.

The Court: It will be received. In evidence as Exhibit 24.

(The document referred to was marked Plaintiff Exhibit 24, and was received in evidence.)

Q. By Mr. Mellin: Now, Mr. O'Neill, from the Lane patent, Exhibit 1, and from Exhibit 24, would you briefly explain to us the operation of the device in the patent in suit as you understand it from the description and drawing?

Mr. Foster: If the court please, the witness has not testified he has read or studied the Lane patent.

The Court: Please lay the foundation.

Q. By Mr. Mellin: Have you studied the Lane patent in suit, Exhibit 1? A. Yes, sir.

Q. And do you understand the construction and operation of the device there disclosed and described?

A. Yes, sir.

(Testimony of Frank E. O'Neill)

Q. All right. Now, from Exhibit 1 and from Exhibit 24 will you please tell us briefly, the construction of the device and its mode of operation? [378]

Mr. Mellin: If your Honor please, may the witness approach the chart?

The Court: Yes.

A. The Lane device includes a tubing 3 shown in Figure 1, by which the device is suspended and by which it is lowered into the well or withdrawn from the well.

It includes a hook wall casing packer shown as Figure 2—at No. 2, I am sorry, in Figure 1.

It further includes a seat for the ball valve shown in Figure 2 at 1-b and the ball of the same valve, 28, in Figure 2.

Q. Now, Mr. O'Neill, in Figure 2 the tubing 2 is the tubing at the bottom of the hook wall packer in Figure 2? A. Yes; this tubing?

Q. Yes.

A. That is correct. That is the tubing at this point at the bottom of the hook wall packer.

Q. All right.

A. Connected to the hook wall packer by screw threads is the gun mechanism for perforating the well with its attendant firing mechanism, which is shown in Figure 2. This Figure 1 shows another packer below which, according to the teaching of the patent, may or may not be used.

Q. That would only be used where they are going to use [379] it as a straddle packer for perforating between two packers? A. That is right, sir.

(Testimony of Frank E. O'Neill)

Q. And state whether or not the patent teaches that lower packer may be dispensed with so that you would merely divide the well into an upper and lower zone by means of the upper packer? A. It does, sir.

The parts assembled on the tubing are lowered into a well to the point at which it is desired to fire the gun and the gun is fired through the firing mechanism in the following way.

The mechanism includes dry cell batteries which electrically are connected, and the dry cell batteries are 14—electrically connected to a series of terminals, shown in Figure 3 at 16 and a distributor arm 18 by which the electrical energy may be transmitted to the terminals as the distributor arm is rotated by a driving mechanism, which involves a bellows, a diaphragm shown at 23 in Figure 2, a driving pawl shown at 24 in Figure 2, which by engagement with the teeth in a sleeve 21, I believe the figure is—

Q. Just a moment, Mr. O'Neill. As I understand it, there are more than one gun barrel in the gun body?

A. The device is shown with one gun barrel in this view, Figure 2. It is shown with more than one in Figure 1.

Q. And there is one gun barrel for each one of the [380] terminal 16, isn't there?

A. That is right. Each terminal is connected to a gun barrel.

Q. So that when the gun fires it fires the gun barrels successively? A. That is right.

(Testimony of Frank E. O'Neill)

Q. From the botton in upward sequence?

A. Well, it doesn't say that it fires them from the bottom in upward sequence. It says one barrel, which I will explain in a moment, is fired last.

Q. All right, go ahead.

A. And a bellows diaphragm operates the distributor arm which permits the connection to each gun barrel in the order in which they are fired, and that is operated by successive accumulations and releases of air in the tubing.

Q. How is that successive releases and accumulation of air in the tubing obtained?

A. The patent doesn't teach that. I presume from some source at the surface. The patent merely says by successive accumulations and releases of air within the tubing.

Q. And what is the effect of that operation on the switch mechanism which establishes circuits through the gun barrels?

A. When air is applied to the bellows diaphragm down [381] the tubing through this bore the ball 28 is not in this position while the air is being applied through this bore and through a valve here shown at 22a, into the bellows diaphragm. The diaphragm expands down and this pawl 24 engages a tube of this sleeve 21 and thereby rotates the sleeve and the sleeve is connected to an axle or axis which is connected through to this same distributor 18 shown here, so as the diaphragm is expanded the contact is moved from one, over one notch as it is released, and the diaphragm contracts the pawl and it disengages and a spring throws it over to engage the next tooth when the next bit of air is put in. [382]

(Testimony of Frank E. O'Neill)

So by the succession of accumulations and releases of air within the tubing the connection is made from one to the other.

The Court: Does the air enter through that valve where in Figure 2 the ball 28 is shown?

The Witness: It would have to, sir. That is the only opening.

The Court: How does the air go into it?

The Witness: The ball 28 is dropped—

The Court: That is dropped from the surface?

The Witness: That is dropped from the surface. In this particular Figure 2 it is dropped later.

The Court: It is shown in place there, but at the time the air is put in and released, as you have described, to activate the gun, the ball has not at that time been dropped?

The Witness: That is correct, sir. There is another method shown of firing the gun, shown in Figure 5, to which I will refer. There is one chamber or barrel of the gun which is sealed, along with the firing mechanism, within a sealing tube 4 shown in Figure 2, with the idea of keeping fluid from entering the annulus A between the sleeve 4, and the sleeve, multiple sleeve 13, I believe it is, which means you have the firing apparatus within the sealing sleeve, and that barrel the patent specifies must be fired last. The purpose of that barrel is that the bullet from this barrel, which is within the sealing sleeve 4, is to perforate the sealing sleeve, [383] making a hole in the sealing sleeve, which hole will act as the inlet port to the tool when the test is taken. In view of that the patent doesn't teach when the packer is to be set, but it would have to be set before that last barrel is fired.

(Testimony of Frank E. O'Neill)

Otherwise, the hydrostatic head would come in before the packer could be set.

The Court: Wouldn't the firing of the other barrel admit fluid also?

The Witness: No, sir, the other barrels are in the continuation of the gun, within the gun body, but are not within the sealing sleeve 4.

The Court: So the only test would be taken of that fluid because of the perforation made by the last barrel fired?

The Witness: That is correct. That would be the inlet to the tool.

The Court: Presumably the fluid that entered below through other perforations might rise and enter through the last perforations made?

The Witness: I think that might happen, sir. I think so.

The Court: But would that have to be inside the casing or outside?

The Witness: Well, this is adapted to run within casing, as shown here, because it shows a hook wall casing packer with [384] the metal slips for seating in the steel casing.

The Court: So presumably fluid entering the casing through perforations made below in the firing of other barrels might rise and enter through the hole, the perforation made by the last barrel fired, and constitute a part of the sample which is taken?

The Witness: That is correct. It could later happen if the formation pressure was there sufficient to cause it to enter.

(Testimony of Frank E. O'Neill)

The Court: Does the patent teach you that is the purpose of the other barrels that are fired, the multiple perforations?

The Witness: To perforate the casing to let the formation fluid come into the tool from the other barrels. This barrel is presumably to perforate the sealing sleeve, and possibly the casing also, if they can get it through both pipes.

The Court: That is the last shot fired?

The Witness: That is the last shot fired, sir, and that shot opens the entrance valve of the tool.

The Court: There would not be any other purpose to be served by the other perforations, that is, the preceding perforations being made, unless it was to admit the fluid from the formation which is sought to be tested?

The Witness: No. That is the purpose of them.

The Court: And the purpose of it would be to enable that [385] fluid to rise and enter the chamber and be captured as a part of the test; isn't that true?

The Witness: That is correct, sir. Before setting this last barrel off, the packer would have to be seated and the hydrostatic head packed off between the body of the tool and the wall of the well casing to hold that hydrostatic head, so that pressure would not be exerted on the perforations when they are made, and be exerted against the formation pressure.

Q. By Mr. Mellin: In that capacity does that packer tool serve the same purpose as packers in prior art testing?

A. Precisely. When the packer has been set by rotation of the tubing to the left, that is, to release the locking lug out of the slips, so that the slips can actuate,

(Testimony of Frank E. O'Neill)

and it is packed off, then the last barrel is fired, and that opens the tool and the fluid from the formation may enter through the bullet hole within the sealing tube 4, pass upwardly through the annulus marked A in Figure 2, in through the ports marked 13a in this inner member 13, and upwardly through the bore marked 1a, and on into the tubing, and the fluid having passed upwardly and into the tubing, as it would be at the proper time, then ball 28—

The Court: What effect does that have on 27, if any, the float?

The Witness: Oh, this float has the effect, as taught by the patent, that whenever fluid has entered this chamber—[386]

Mr. Mellin: That is the chamber surrounding the ball 27?

The Witness: The chamber surrounding the ball 27, whenever fluid has entered there, the fluid will be lifted by the float and close this valve 22a and prevent further air pressure actuating the device. It shuts the air off of the bellows diaphragm by closing that port 22a by the fluid.

Q. By Mr. Mellin: Now, when the tester has been left in that position long enough to let the test, the sample accumulate, then, as I understand you, the ball 28 is dropped from the surface to seat on the seat—

A. 1b, sir.

Q. —1b. Now, what does the patent teach you with respect to the function of ball 28 to seat on the seat, 1b?

A. It is for the purpose of trapping the sample in the tube and bringing an uncontaminated sample, a substantially uncontaminated sample to the surface.

(Testimony of Frank E. O'Neill)

Q. Now, does the patent itself teach you that the object of the ball valve 28 is to exclude the fluid in the well above the packer under the hydrostatic head, when the packer is broken, from entering the tubing tool through the passage 1a into the test sample?

A. The language of the patent says that it is to obtain an uncontaminated sample or substantially uncontaminated sample, and in order to do that the ball valve would have to [387] seat to restrain the hydrostatic head of fluid without the tool from entry into the sample.

Q. Assuming, Mr. O'Neill, that in the Lane device the amount of fluid in the tubing tool which was taken in after the gun was fired, and which would constitute the sample, is less than the amount necessary to equalize the hydrostatic head in the bore annulus surrounding the tool above the packer, what would occur, if anything, when the packer 2 is released?

Mr. Foster: Might I inquire whether this question is based upon opinion and conjecture, or based upon experience, and whether he is inviting an answer on which basis?

The Court: Is it a request for his opinion?

Mr. Mellin: It is a request for his opinion.

The Witness: In my opinion, sir, the hydrostatic head above the packer, when the packer is released, would be applied downwardly through the entry port to the tool and upwardly against the bottom of the ball, and if the hydrostatic pressure is greater than the pressure of the fluid within the tube down on the ball, the ball would be lifted and additional fluid from the drilling fluid of the hydrostatic head would enter.

The Court: Is there any equalizing valve used or shown or taught in connection with this apparatus?

The Witness: No, sir. [388]

(Testimony of Frank E. O'Neill)

Q. By Mr. Mellin: Now, Mr. O'Neill, do you have with you any information showing the approximate average depths of taking a casing water shut-off test by the Johnston Company during some fixed period?

A. I had such a compilation made, sir.

Q. I hand you what purports to be a list of tests, and ask you what it is.

You can go up on the stand now, if you wish, Mr. O'Neill. What is the data recorded on these sheets that I hand you?

The Court: Before you go ahead with that and before we leave the discussion of the Lane patent,—

Mr. Mellin: I am not going to leave it. I am getting first an average well depth and pressure so that I can go into it.

The Court: Very well.

Mr. Mellin: Or would your Honor care to question him further now?

The Court: No.

Mr. Mellin: I am not leaving it.

The Court: You will probably cover what I have in mind. [389]

Q. By Mr. Mellin: What is the data on the sheets that I handed you, Mr. O'Neill?

A. This is a compilation of the test run in casing by the plaintiff company, the Johnston Company, during the month of June 1947.

On the left of the page is given the name of the company for whom the test was run and the next column, going toward the right, gives the ticket number in the Johnston run ticket book for that test.

The next column, moving towards the right, shows the depth at which the packer was set.

(Testimony of Frank E. O'Neill)

Q. Now, that is the depth given in feet, isn't it?

A. That is feet. The next column to the right, which is marked "Size of main hole" is actually the nominal casing size. That is, the casing is spoken of as a five and a half or seven-inch casing and by the API—that is the American Petroleum Institute regulations, that refers to the outside diameter of the casing. It does not mean that the bore of the casing is five and a half or seven inches because it isn't. There is a wall thickness and that varies with the weight of the pipe.

Q. All right, and what is the next column?

A. The next column shows the type of test made, whether it was a water shut-off test or a production test. Actually all the water shut-off tests are not so labeled but the production tests are labeled. [390]

Q. And what is the next column?

A. The last column toward the right shows the amount of fluid taken in and some description of the fluid in instances.

Q. Now, the amount of fluid is given in feet in rise in the drill pipe or tubing to which the tester was connected?

A. In almost every instance, sir. There are one or two places where they have given it as it was on the ticket, in stands.

Q. And when it is in a stand you would have to multiply it by the height of a stand?

A. By the length of the stand. That is a little indefinite because it is a matter of what height of rig we are working on. It might be a 90-foot stand and it might be less than that.

(Testimony of Frank E. O'Neill)

Q. Now, these figures were obtained from the records of the plaintiff, were they?

A. They were, sir.

Q. Now, from these tests did you arrive at an approximate average depth at which a water shut-off test was made during the month of June by the Johnston Company?

A. I did, sir.

Q. And what is that average figure?

A. The average depth at which the packer was set was [391] 4,581 feet. Approximately 4600 feet.

Q. What was the average rise of the sample fluid in the tubing during the same period as shown by these records?

Mr. Foster: I object to that. I anticipated before he got to the figures that plaintiff's counsel would offer this compilation in evidence. I think that any use of this information is unwarranted and objectionable on the ground that it is only a compilation. It apparanetly was not made by this witness. There is no showing that he performed all of the tests that are set forth, the source from which the compilation is made is not produced for the inspection of counsel, and hence, I think the use of the figures in the manner now contemplated by counsel is as objectionable as the compilation itself.

The Court: Did you compile these figures yourself from records made in the course of business of the plaintiff company?

The Witness: I had them compiled by the men who keep the records.

The Court: Whose duty it is to keep the records?

The Witness: Yes, sir.

The Court: Is this information that is required to be kept in connection with each test made?

(Testimony of Frank E. O'Neill)

The Witness: Yes, sir.

The Court: And customarily kept? [392]

The Witness: Customarily kept, yes, sir.

The Court: Over what period of time?

The Witness: It has always been kept.

The Court: For a number of years?

The Witness: For a number of years, yes, sir.

The Court: What is the purpose of it?

Mr. Mellin: Going to show an average in order to further explain the Lane tool and the fact that valve 28 will not operate. I am going to take the average of these depths and have him testify from that as to what would occur in the Lane tool at an average depth well merely to illustrate his testimony that the ball valve 28 is not operative.

The Court: Wouldn't that depend upon how much of a hydrostatic head was present?

Mr. Mellin: Hydrostatic head, that is true. That is exactly what I am going to show.

The Court: It might be one thing in one well and another thing in another.

Mr. Mellin: That is right. That is why the document here shows the hydrostatic head.

The Court: Would there be anything to prevent, for instance, the person using the other tool from lowering the pressure by pumping it out?

Mr. Mellin: You mean pumping out the hydrostatic head?

The Court: Some of it. [393]

Mr. Mellin: I think the testimony shows that that is never done if they run it down to that point. Our theory is, your Honor, as explained to the court in my opening statement, that before this ball valve can function to

(Testimony of Frank E. O'Neill)

keep out the hydrostatic head of fluid, the stand of fluid in this tubing must be of equal pressure so as to equalize the hydrostatic head.

The Court: That would be a physical fact, I take it, and if the court had judicial knowledge of it it could take judicial note of it as a physical fact. But I do not know what aid these data would be to us.

Mr. Mellin: Well, this data shows you that over—of course one of our contentions, your Honor, is that this tool, even if it had been made, would be of no practical benefit to the industry because they could never get a test or sample and the compilation shows the average test made in California over a period of one month. Now, in some of those—

The Court: This witness, I take it, is an expert and testifies as to pressure exerted at a certain depth by the hydrostatic head in the well and as to the pressure exerted by a column of test fluid of a certain height. That is all we would need to know, isn't it?

Mr. Mellin: Yes, your Honor.

The Court: I will tell you right now from my limited [394] knowledge of physics and hence limited judicial knowledge on the subject, I would take judicial notice as a physical fact, that unless the pressure inside the tube plus the weight of the ball equal the pressure from the outside, the ball would be inclined to rise from the seat of the valve and admit other fluid to equalize the pressure. I think that is an elementary physical fact, isn't it?

Mr. Mellin: We think it is, too, but I would like to offer this compilation in evidence to show how much fluid normally, that is, over a course of time, over a period of months in taking the casing tests over perforations was

(Testimony of Frank E. O'Neill)

the usual rise of fluid in this tubing and for that purpose, as a part of the record, the plaintiff offers that in evidence as Plaintiff's next in order.

The Court: Is there any showing in the use of the Johnston apparatus that the tester permits the fluid to rise as high as it will rise in the tester?

Mr. Mellin: That is the testimony I want to offer to your Honor. It usually is in water shut-off tests. Usually let it stand until it won't take any more water.

The Court: I take it you could ask his opinion as an expert; but these data would seem only to be reasons for his opinion. In other words, he might go out and test 40 wells and he finds in a certain field—I suppose it depends upon the gas pressure, doesn't it? [395]

Mr. Mellin: Well, it may and may not, your Honor. For example, in taking a water shut-off test they sometimes get but three feet of water in there over a period of time. They may get more or they may get a smaller amount or they may get a small amount of salt water in the tubing and then if they break the packing the hydrostatic head would enter until it equalized the pressure. It is our contention this device is not operative and that is exactly what I wanted to show by this witness. And I also wanted to show the velocities under hydrostatic pressure which are normally encountered in wells. These fluids change or vary from 75 feet, 26 feet, 200 feet, 35 feet, 22 feet, 23 feet, 30 feet, 63 feet, 40 feet, 50 feet, and all different heights of rises of fluid and then the sheet also shows in red occasional mis-runs of the tool when the packer fails to hold or when there is a leak in the tool above.

Now, I want to put this in evidence to show that in normal operations in these fields that this tool would be

(Testimony of Frank E. O'Neill)

of not practical benefit to the industry because it cannot make a sample which is uncontaminated to the extent it would furnish information.

The Court: I take it the witness can testify as to what the weight of the column of this drilling mud or fluid is, the hydrostatic pressure under varying circumstances, and also the pressure given by a column comprising the test [396] fluid, plus the weight of the ball and if we have that the rest of it naturally follows, doesn't it?

Mr. Mellin: The only thing is, I wanted to show the average rise of fluid in that tubing as a basis for asking this witness a hypothetical question with respect to weights and velocities.

The Court: Why don't you ask him? He is an expert. But do not ask him to offer data on which he bases his opinion. What you are offering now is data on which he bases his opinion, isn't it?

Q. By Mr. Mellin: Mr. O'Neill, assuming that a well bore was drilled and cased and the packer was set at a normal distance above the bottom at the 4500-foot level.

The Court: What would be "a normal distance above the bottom."?

The Witness: Anything like six, eight or ten feet above the bottom of the pipe, up inside of the bottom joint of the pipe and we try to keep the actual parts of the tool, of the anchor from being too far out of the pipe for the danger of running into sand and catching it. We try to keep it at the bottom. That would put the packer the length of the anchor and part of the mandrel would be packed up off in this five, six or eight or ten feet.

The Court: You are referring now to a casing test?

(Testimony of Frank E. O'Neill)

The Witness: Yes, sir, we are referring to a casing [397] test.

Q. By Mr. Mellin: Then assume that the packer has been set at that level and assume that the mud level of the drilling fluid in the casing is approximately at the surface and that in the tubing above the packer there was a rise of fluid of 600 feet.

Now, I show you a diagram and ask you if that diagram illustrates the assumptions which I have made?

A. Yes, sir.

Mr. Mellin: May I have that marked for identification, your Honor?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 25 for identification.

(The diagram referred to was marked as Plaintiff's Exhibit 25, for identification.)

Mr. Mellin: I will give you a copy, Mr. Foster.

Q. By Mr. Mellin: And assuming that the lower end of that tubing is closed by a ball valve downwardly seated and that the tubing in the interior and that the fluid in the interior of the tubing rose 600 feet and at that point what would be the hydrostatic head of fluid on the packer?

A. The hydrostatic head of fluid on the packer?

Q. Yes.

A. That is while the packer is set, I take it?

Q. While it is set, yes. [398]

A. You set your packer at 4500 feet so you would have 4500 feet of fluid and the average of—well, fluids now, drilling mud will vary. We always run with the annulus full to the surface so we can consider a full column of drilling fluid, I think. That is always up there for safety purposes. And for the average of mud used

(Testimony of Frank E. O'Neill)

in the field it would probably be about 80 pounds to the cubic foot. We divide that by 144 and we would come out a little bit over a half pound of hydrostatic pressure exerted for each lineal foot of depth.

Q. So that would be— A. Of fluid.

Q. So that would give you a pressure on top of the packer of how much?

A. About 2,250 pounds per square inch.

Q. A little over a ton per square inch of pressure?

A. Yes, sir.

Q. So that under those circumstances if this tool were set at that depth as is shown on that chart—

The Court: That is the Lane tool?

Mr. Mellin: The Lane tool as shown in the Figure 2, the pressure on the packer tube downwardly by the hydrostatic head would be 2,250 pounds per square inch?

A. Approximately that.

Q. If the sample fluid that was at a head of 600 [399] feet and that was salt water what would the pressure of that be on top of valve 28?

A. Well, salt water of course would be a little bit heavier than pure water. I frankly don't know the figure for salt water, but pure water would be about .434 pounds per square inch per lineal foot of depth and say it is .5 it would only be 300 pounds of fluid pressure downward per square inch on the ball.

Q. In other words, under those circumstances there would be a downward pressure of 300 pounds per square inch on the ball but 2,250 pounds per square inch on top of the packer? A. Yes, sir.

(Testimony of Frank E. O'Neill)

Q. Now, assume that the packer is released what would occur, if anything, under those conditions?

A. Well, the differential heads there would cause the fluid from the high pressure side to go into the tool and raise the ball. The ball would weigh, probably, three or four or five pounds, depending on the size of it. It might be less than that. So that weight of the ball added to the weight of the column of fluid inside there would be the force holding back the hydrostatic head and the hydrostatic head itself would be exerted at the bottom of the ball and the ball would move upward and let the hydrostatic head in.

Q. Now, have you calculated under those conditions [400] and the situation just as I have given it to you and shown on the chart, the approximate velocity of the entry of that mud fluid from the hydrostatic head after the packer had been released in the tool and through the ball seat?

A. I first made an approximate calculation for the entry of fluid into the tube 4 through the bullet hole made by the last gun fired, which was a sealed-in gun. The fluid entering there would have to rise and pass up through the annulus above. Now, in the patent I did not have any dimension for the orifice at 1a but—

The Court: That is the opening beneath the ball 28?

The Witness: Yes.

Q. By Mr. Mellin: This space here?

A. Yes, sir.

The Court: 2 of Figure 1.

(Testimony of Frank E. O'Neill)

Q. By Mr. Mellin: Will you state whether or not the companies require the tool to ordinarily be beaned?

A. In almost every instance the company for whom we are making the test will require that we use a choke orifice for an inlet to the tool.

Q. And what is the average diameter of that or usual diameter of the choke?

A. Well, some companies specify a quarter of an inch and some specify $3/8$ ths. I think occasionally they specify not to exceed a half inch but the average or most common one [401] is $3/8$ ths-inch diameter bean or choke.

Q. And assuming, then, that that orifice 1a below the ball 28 in the Lane device to be $3/8$ ths of an inch in diameter, did you calculate the velocity of the fluid entering through there under the conditions, the initial velocity under the conditions I have given you?

A. Approximately, sir. I estimated it to be about 400 feet a second.

Q. That is 400 feet a second velocity?

A. That is the way I figured.

Q. Do you happen to know what the velocity of the fluid discharge on a fireman's hose nozzle is in the City of Los Angeles?

Mr. Foster: I object to that as wholly immaterial and irrelevant.

The Court: It might help me to comprehend the figure. Objection overruled.

The Witness: The pressure on the fire hose is about 150 pounds.

Q. By Mr. Mellin: That is pounds per square inch?

A. Yes, and the nozzles vary from a quarter inch to $15/16$ ths, and you can compute the velocity under that head. It is approximately 145 or 150 feet second.

(Testimony of Frank E. O'Neill)

Q. 145 to 150 feet per second?

A. Approximately that. [402]

Q. So under your calculations, under the conditions I have given you, the initial velocity of the mud fluid entering that tubing would be over twice that of the velocity of the discharge from a fire hose in a municipal department such as in Los Angeles?

A. Yes, I think so.

Q. Now, of course, that is the initial velocity, isn't it, Mr. O'Neill?

A. That is correct.

Q. And that progressively decreases in velocity as the fluid here rises to equalize the load—that is to equalize the hydrostatic head?

A. Yes, the fluid would tend, when that packer was pulled loose, to fall between the well casing and the tubing, but the operator would not permit that. That is dangerous. So they pump fluid in all the time and keep that full, so the thing would tend to decrease, would tend to decrease your velocity—the thing that would tend to decrease your velocity would be the rising of the mud in the tube and not the double fall and rising, just the rising. It is the differential head that will produce the velocity.

Q. Now, is the fluid that you take in from the formation either in a water shut-off test or in a formation test, ordinarily of greater or lesser specific gravity than the fluid in the casing, the drilling mud in the casing? [403]

A. The fluid from the formation is almost always of lesser specific gravity than the drilling fluid that we are using at the hydrostatic head.

(Testimony of Frank E. O'Neill)

Q. The reason for that is to keep the well from blowing out?

A. Yes, that is one of the reasons. That may be said. There are exceptions to that last statement I made, Mr. Mellin. In some instances they might use a drilling fluid that wasn't really any heavier than the oil.

Q. Are those the instances where they use oil as a driving fluid?

A. Those are the instances where they use oil as a driving fluid or an oil base mud which has a great deal of oil in it. That would be a little heavier but oil may be used as a drilling fluid and in those instances, why, the drilling fluid would be very little heavier than the fluid taken in, but that would be in the minority of cases.

* * * * *

Q. By Mr. Mellin: Under those conditions, Mr. O'Neill, [404] that is, the conditions shown in the diagram that we have just been discussing and assuming that the packer had been released and the hydrostatic head has entered the bottom of the tool, will you state whether or not the sample which had been previously taken would be masked?

Mr. Foster: The same objection—indefinite as to the use of the term masked. [405]

Q. By Mr. Mellin: What does the word "masked" mean in connection with the sample, Mr. O'Neill?

A. It would mean the same as it would in connection with a person. The actual identity is more or less not visible, you could not determine it from its visible appearance; the contents of the sample, in other words.

The Court: Percentagewise or in proportion, how much contamination of the drilling mud and other foreign

(Testimony of Frank E. O'Neill)

matter may be present in the sample and still not ruin the test?

A. I am not sure exactly that I can answer that in a percentage figure.

The Court: Isn't there a tolerance that is accepted out of experience?

The Witness: Well, out of experience, primarily in visual examination and possibly in an examination from a mechanical point of view. For instance, they might be using a drilling fluid that would contain a certain amount of salt in it, and maybe they took in a small amount of water and they got some drilling fluid with it. If the contents showed a very great increase of salt content, they would assume salt water had been added to it through the sands. But, frankly, I couldn't say that there is a percentage beyond which they wouldn't permit it. It would depend to a great extent on the quantities probably involved, too.

The Court: I suppose so, but if you were taking a test, [406] and as I understand it, always with any device that is known it will admit ahead of the test sample some of this drilling mud and fluid?

The Witness: That is correct, from below the packer.

The Court: Now, if you took the packer and it stood 10 feet high in the tube, and 3 feet of it was drilling fluid, would you throw out the test?

The Witness: No, sir.

The Court: Or if it was 10 feet out of 100 feet?

The Witness: I think not in those cases. The case might be more complicated if we had in the tubing when we got out of the hole 3,000 feet of fluid, and from what source we don't know. Or, we may have had 1,000 feet in there at the end of the test and a leak may have oc-

(Testimony of Frank E. O'Neill)

curring in coming out of the hole, and we equalized another 2,000 in. In cases of that kind we would not know how to estimate it. We would have a chemical analysis made of the fluid, but even that might not tell us. If the fluid in the tubes is so definitely of a nature like pure oil, or pure water, or it is oil and then some heavy thick mud that doesn't show any presence of water with it, in that case they would probably assume that the water was excluded. But those are tests where the test will identify itself. But we get some tests where there is nothing to identify unless we can keep out as much as possible of the extraneous well fluids. [407]

I don't know whether I have answered your question, sir.

Q. By Mr. Mellin: If the amount of foreign matter, for example, or let's take the instance, Mr. O'Neill, of the amount of fluid taken in from the well bore that is between the perforations and the packer, and you know that will enter the testing tool when the testing tool is opened over the perforations. Is that a known or an unknown quantity?

A. That is relatively or substantially a known quantity. You know about the bore of the hole that you have below your packer, and that you could compute reasonably.

Q. And then you can make compensation for that in a sample?

A. Yes, that could be compensated for, sir.

Q. Now, if the amount of fluid taken in is considerably great, and it is in an unknown quantity, such as the hydrostatic head driving the mud fluid in behind the sample, would you be able to compensate for that quantity in determining whether the sample is satisfactory to you or not?

(Testimony of Frank E. O'Neill)

Mr. Foster: That is objected to unless "considerably great" is defined.

Mr. Mellin: Let's say 500 feet.

The Court: Does that meet your objection?

Mr. Foster: He hasn't said how great the sample is above this mud entering the tube, and I think that should be determined. [408]

Mr. Mellin: We will say 500 feet.

The Witness: Then definitely in answering that, sir, when I come out of the hole with the fluid I have 1,000 feet of fluid. I don't know that there was 500 feet in there at the conclusion of the test unless I lower something into the well to find out. I might have 300 feet on my sheet, or might have had 100 feet on my sheet, or had 900 feet in my test, and now I have 1,000 feet of fluid. Where did it come from?

Q. By Mr. Mellin: Now, would you say, Mr. O'Neill, when the packer is released and fluid enters from the hydrostatic head, under the influence of the hydrostatic head, into the bottom of the tester, would you say that to you that would be a successful or an unsuccessful test?

A. That would be an unsuccessful test to me.

The Court: Then, in your opinion, no formation tester would be a successfully devised tester unless it would exclude from the sample,—through its operation exclude all fluid other than the relatively known portion of drilling mud that would be taken in in advance of the sample?

The Witness: That is primarily the way I feel about it, sir.

There is one instance that we haven't brought up, and I don't want to leave this impression: Sometimes in a very deep hole, where a company will not dare run their pipe that [409] deep for fear of collapsing the pipe from

(Testimony of Frank E. O'Neill)

the hydrostatic head on the outside, the company will assemble a tool, and they will say, "We will run 1,000 feet of fluid." So they will put drill pipe between the tool, except for the trip valve, and fill that with fluid, a known amount, and then set the trip valve in on top of that fluid. That is what they call a cushion to protect the pipe in very deep holes.

The Court: That is a known quantity?

The Witness: That is a know quantity, yes, sir.

The Court: Then does that alter your opinion, as I understood you to express it, that no tester is a successful or will be a successful tester unless it can be so operated as to exclude all fluid other than the known quantities or relatively known quantities in addition to the sample taken?

The Witness: That is correct, sir; absolutely correct.

Q. By Mr. Mellin: In your opinion, Mr. O'Neill, would a tester be of any practical benefit if it was not provided with a valve which would prevent the entrance of any fluid into the tester after the sample had risen in the tester above the valve?

A. I would like that question read back, please.

The Court: Please read it, Miss Reporter.

(The question was read.)

The Witness: Am I to understand that the sample has risen in the tester above the valve and the valve has been [410] closed behind it?

Q. By Mr. Mellin: Has been closed.

A. That is correct. The valve closes to keep out the drilling fluid from the sample, and if the valve won't close and do that it isn't a testing device of any utility, so far as I am concerned.

(Testimony of Frank E. O'Neill)

The Court: Then, in your opinion, this device depicted on Exhibit 1 would not be a successful tester by reason of the ball valve which is depicted as item 28 on Figure 2 of Exhibit 1?

The Witness: That is right, sir.

The Court: For the reasons that you have stated?

The Witness: For the reasons I have stated.

Q. By Mr. Mellin: Now, Mr. O'Neill, from the patent itself, that is the Lane patent, Exhibit 1, does that patent teach you anything with respect to the ability of the ball valve 28 excluding the fluid under the influence of the hydrostatic head when the packer 2 is released?

A. That Figure 5 right there (indicating)—

Q. Of the Lane patent?

A. I didn't explain that on the Lane patent.

Mr. Mellin: May he approach the diagram, your Honor?

The Court: Yes. That is Figure 5 of Exhibit 1?

The Witness: That is right, sir.

The Court: Shown on the chart, Exhibit 24. [411]

Mr. Mellin: At this time, your Honor, may I offer in evidence to illustrate the witness' testimony the diagram of the well which he referred to in connection with the hydrostatic tests?

Mr. Foster: I think it is illustrative of the assumptions of counsel. I have no objection to its being admitted for illustrative purposes.

The Court: It is illustrative of the answer of the witness in response to the hypothetical question involving counsel's assumptions.

Mr. Foster: Yes.

The Court: It is Exhibit 25, for identification, is it not?

(Testimony of Frank E. O'Neill)

Mr. Mellin: It is, your Honor.

The Court: It may be received in evidence.

(The diagram referred to, heretofore marked Plaintiff's Exhibit 25, for identification, was received in evidence.)

The Court: And at this juncture I will say that if you desire to offer the data and make a record as to the excluded evidence with respect to the experiments on the record of the plaintiff company in testing wells, I will permit it to be made a matter of record, pursuant to rule 43-C.

Mr. Mellin: I do not care to do that. I think we are proceeding along all right. [412]

Q. By Mr. Mellin: Go ahead, Mr. O'Neill.

A. The Figure 5 shown—

Q. In the Lane patent, Exhibit 1?

A. —in the Lane patent, Exhibit 1, marked Exhibit 24, for identification, is another method of firing the Lane gun in connection with the tester when there is only one barrel operated. The patent teaches that on many occasions it will only be necessary to run one gun barrel, and that gun barrel will be within the sealing tube 4. The fact that there is just one gun barrel makes it unnecessary to operate this complicated mechanism shown here for firing the multiple chambered guns, and in this instance the patent shows an electrical switch at 32, at contacts 32 and 33. It shows a rod, the lower end of which, marked at 31a, is insulated and resting against the movable part of the electric switch 32. The upper end of the rod, the rod having passed through the bellows diaphragm, the upper end of the rod extends into the annulus 1a, where it may be contacted by the ball valve 28 when the ball valve is dropped.

(Testimony of Frank E. O'Neill)

Now, this one chamber of the gun must be fired before the tool is open, and it is fired by dropping the ball. So to fire the thing, the gun, the ball 28 is dropped and strikes the rod, which is located in this annulus 1a, and the rod closes a switch which makes the connection to the single gun chamber which fires a projectile through the sealing sleeve 4, [413] thereby opening the tester to the entrance of fluid—and we assume that the packer was set before that chamber was fired, so we will say to the entrance of fluid from below the packer. In this instance the formation fluid itself must enter with the ball in place. It must lift the ball.

Q. That is the ball 28?

A. The ball 28 in order to enter. Now, if the pressure in the formation will lift the ball 28, the hydrostatic head would definitely lift it, because the hydrostatic head is either greater than the formation pressure or the well would be blowing out.

The Court: Then, in your opinion, the Lane tester with the single firing gun would never get a usable sample; is that it?

The Witness: Neither one of them would get a usable sample, the single or the multiple, in my opinion, sir.

The Court: Does the Lane patent, Exhibit 1, teach that the ball valve used in the device depicted in Figure 5, the single firing device, is the same ball valve as is pictured on Figure 2 of Exhibit 1, the multiple firing gun?

The Witness: Yes, sir. If I may read from the claims—

The Court: You don't need to read it. I am just asking you.

The Witness: Yes, sir. The ball valve 28 engages the upper end of the pin and closes the valve. [414]

(Testimony of Frank E. O'Neill)

The Court: And you assume that is the same ball that is dropped into the device pictured as in Figure 2 of Exhibit 1?

The Witness: Yes, sir, that is the same ball.

The Court: You reason from that that if the formation fluid would lift the ball to admit the formation fluid to the testing chamber, that once the packer is released upon removing of the device from the well that the pressure of the hydrostatic head would clearly force a quantity of the drilling fluid up into the testing tube as well?

The Witness: Yes, sir; as shown in Figure 5, because the ball has to be there before the fluid ever starts in.

The Court: It takes it, it is your opinion that the Johnston device is of practical use because the main valve, which admits the fluid to the tester chamber or to the tube, is upwardly seating and pressure from the hydrostatic head as the device is removed from the well tends to hold the valve closed upward rather than to push it open?

The Witness: That is correct, sir. There are many successful testers but they are all on that principle of an upwardly seating valve.

Q. By Mr. Mellin: Now, referring to Exhibit 17 before you, which is the book of patents, Mr. O'Neill, will you point out whether or not you find in any of those prior art patents a disclosure of a well testing or sampling device, the lower end of which is closed by a sealing element which is adapted [415] to be opened in a position when a ball is dropped, thereby rupturing it?

A. Yes, sir.

(Testimony of Frank E. O'Neill)

Q. What patents, if any?

A. I find that feature in the McGregor patent. Now, the McGregor patent does not carry a packer, but, as I testified earlier, it was for the purpose of securing materials from subaqueous bottoms.

The Court: The McGregor patent is Exhibit 17-C?

The Witness: Yes, sir, that is correct, 17-C. The same principle is involved in Harris.

Q. By Mr. Mellin: Is that 17-J?

A. That is 17-J, the patent to Harris. The patent to Steele may not quite answer that. The patent to Steele they say has a plug in the bottom of the tubing and they drop a weight in and knock the plug out. It does not say it ruptures it, or that it is frangible. It just says a plug.

The Court: Are you referring to Exhibit 17-A?

The Witness: 17-H, sir.

Q. By Mr. Mellin: Are those all of them, Mr. O'Neill?

A. I believe that is all that will so open.

Q. Now, will you state whether or not you find in the prior art patents of well testers and samplers the disclosure of the use of a ball valve, which is dropped down the tubing after the fluid has entered the tubing to seat downwardly, to [416] prevent the escape of fluid downwardly out of the tubing?

A. Well, the patent identified as 17-J to Harris has that feature.

Q. And that is the ball valve 23, which is dropped downwardly after the fluid has entered?

A. And seats in the tapered member 13.

(Testimony of Frank E. O'Neill)

Q. 13?

A. Yes. The patent to Macready, there is one there. 17-W is the identification number I have on it.

Q. Is that in Figure 15, the ball valve 33?

A. In Figure 15, the ball valve 33, that is correct, sir.

Q. Now, will you state whether or not you find in the prior art of well testers a disclosure of a well testing or sampling tool having a packer to divide the well bore into upper and lower zones and preventing communication between said zones?

A. That is disclosed in practically all the patents that we have cited which are well testers, with the exception of McGregor. McGregor didn't show a packer. But the entire group of well testers do.

Q. Do you find in the prior art and disclosure of the well-testing tools a well tester or sampler tool having two spaced packers to pack off a zone in the well bore from above and below the packer? [417]

A. That is found in the patent of Burr and Wakelee, 17-A, for identification. It is now shown in the patent to Steele, Exhibit 17-H, but described in the patent, as I recall, where he says, "I will include as many packers and as many of section 7 and 8 as may be necessary to shut off the strata to be tested from other strata." I would assume he would use two, if he wanted to.

The patent to Erwin, 17-I, shows the strata packer idea, two packers above and two below the zone to be tested.

Q. Is that all, Mr. O'Neill?

A. Well, I believe so, sir.

The Court: We will take the afternoon recess at this time.

(Testimony of Frank E. O'Neill)

(A short recess was taken.)

Q. By Mr. Mellin: Mr. O'Neill, before the recess you stated that upwardly seating valves were the type, as I understood your testimony, the only type that would effect an entrapment and would prevent the fluid under the influence of the hydrostatic head entering the tubing and the tester. A. I so testified.

Q. Are there other types of valves?

A. Yes, sir. I was thinking at the moment as between downwardly and upwardly seating valves. There are rotary valves which have operated successfully, and there are slip valves which have operated successfully. [418]

Q. In other words, the valves which will operate successfully, as I understand it, are those which cannot be opened by the influence of the hydrostatic pressure?

A. That is correct, sir.

Mr. Mellin: Now, if your Honor please, on the point of ball valves we have brought into court a device for demonstrating the fact that the ball valve, such as in the Lane device, will not maintain its seat when there is a differential in pressure between the exterior of the tool and the interior of the tool. Now, if the court thinks it would be of any aid to the court in demonstrating the fact, we will demonstrate it with the tool. Otherwise, we will not. If it will be of any help to the court, we will be glad to make the demonstration.

The Court: Well, my understanding of the physical factors involved would be this, that unless the pressure inside of the tube, which is the tester, plus the weight of the ball is greater than the outside pressure of the hydrostatic head seeking to enter through the aperture covered

(Testimony of Frank E. O'Neill)

by the ball, the fluid from the outside would be admitted. Now, I may in error on that, but that is my understanding, and I am telling you both so you can correct me if I am in error.

Q. By Mr. Mellin: Mr. O'Neill, do you have with you a device for demonstrating the fact that when the pressure primarily of the tubing that has a downwardly seating ball [419] valve at its lower end is greater, the pressure on the interior of the tube, than the outside hydrostatic head, that the fluid will enter through the ball valve? A. Yes, I have.

Q. Is that the device here? A. Yes.

The Court: It would not help me, Mr. Mellin, in my understanding, to have that. If my understanding is in error, I would like to have it demonstrated.

Mr. Mellin: Well, your understanding is not in error.

The Court: I thought it was all as simple as the saying that water seeks its own level. Does the defendant dispute that?

Mr. Foster: I think not, your Honor.

The Court: Am I in error on that?

Mr. Foster: I think not.

Mr. Mellin: And may I withdraw those questions from the record, I mean the question relative to the device, and I will not offer to demonstrate it.

The Court: Very well.

Q. By Mr. Mellin: Now, Mr. O'Neill, as I understood your description of the operation of the Lane tool, the packer, after the tool is lowered into the hole, the packer must be first set and then the gun must be fired, and immediately that the last bullet, the top bullet, pene-

(Testimony of Frank E. O'Neill)

rates the [420] sealing tube 4, the tool is opened for the entry of the sample into the tool; is that correct?

A. That is correct, where the single chambered gun is used.

Q. I mean when this bullet, this last bullet has ruptured—the sealing tube has been ruptured by the bullet, when the tool is opened to receive the sample?

A. That is correct, sir.

Q. And after a sufficient time has elapsed to enable the test fluid to enter the tool, the ball valve 28 is dropped to seat on seat 1b, and the packer is released and the tool withdrawn from the hole?

A. That is correct.

Q. Now, in the Johnston tester tool that is used today, and the one which you operated from 1933 to 1938,—well, let's strike that.

In the Johnston tool today, when it is run with a tester assembled on its bottom, is it necessary to first seat the packer before the perforator gun is operated or not?

A. May I have the question read back, please?

(The question was read.)

Q. I beg your pardon. I have the tester and gun backwards.

In the Johnston tester tool with the perforator gun suspended or assembled on the lower end of it, and it is run in [421] for the operation, is it first necessary to seat the packer before firing the gun? A. No.

Q. And in the Johnston tester is the tester opened immediately that the gun is fired? A. No.

The Court: It would not be necessary to seat the packer in the operation of the Lane apparatus except prior to the firing of the last charge; isn't that correct?

The Witness: That is correct, sir.

(Testimony of Frank E. O'Neill)

Q. Now, will you turn to Exhibit 1 and turn to claim 7.
A. Yes, sir.

Q. You have read those claims? A. Yes, sir.

Q. Now, I read you from claim 7:

"In combination; a packer adapted when set to divide a well casing into upper and lower zones."

Will you please state what that describes to you as an expert in the art with reference to the physical or operable characteristics of that packer?

Mr. Foster: Just a moment. I object, your Honor, upon the ground that the question is now calling for a construction and interpretation of the patent claims, which is the exclusive province of the court. [422]

Mr. Mellin: If your Honor please, the legal interpretation of the claims and legal scope of the claims is the province of the court. The question of what the elements of the claims were originally directed to those skilled in the art, to define the metes and bounds of the invention,—in other words, in compliance with the statute they are required to concisely state just what device is covered that is within the scope of the patent.

Now, under statute 4888 Revised Statutes it is required that those claims be so specific that they specifically tell one skilled in the art the limits he may go to in the claim.

Now, in the Halliburton case which arose in this court, the Supreme Court said—

The Court: Before you proceed I would like to have the question read.

(The question was read.)

The Court: Objection overruled.

Mr. Foster: I object also on the ground of immateriality, if I am not too late. It is immaterial as to what this language means to this man.

(Testimony of Frank E. O'Neill)

The Court: What is the materiality of it?

Mr. Mellin: The materiality, your Honor, is to show whether or not it accurately and correctly describes the device or machine with the particularity required, which is a question of fact, in that that is directed to one skilled in the [423] art, and to be of aid to the court, to have an expert testify to the fact that it describes only this element, not by any physical or operable characteristics, but solely by its function. That is clearly a question of fact.

In the Halliburton case the Supreme Court said:

“Under these circumstances the broadness, ambiguity, and overhanging threat of the functional claim of Walker become apparent.”

And they go on to state:

“* * * In this age of technological development there may be many other devices beyond our present information or indeed our imagination which will perform that function and yet fit these claims. And unless frightened from the course of experimentation by broad functional claims like these, inventive genius may evolve many more devices to accomplish the same purpose. * * * Yet if Walker's blanket claims be valid, no device to clarify echo waves, now known or hereafter invented, whether the device be an actual equivalent of Walker's ingredient or not, could be used in a combination such as this, during the life of Walker's patent.

“Had Walker accurately described the machine he claims to have invented, he would have had no such broad rights to bar the use of all devices [424] now or hereafter known which could accent waves. For

(Testimony of Frank E. O'Neill)

had he accurately described the resonator together with the Lehr and Wyatt apparatus, and sued for infringement, charging the use of something else in combination to accent the waves, the alleged infringer could have prevailed if the substituted device (1) performed a substantially different function; (2) was not known at the date of Walker's patent as a proper substitute for the resonator; or (3) had been actually invented after the date of the patent."

And, therefore, the claims here were invalid as violating the statute.

Now, the claims are directed to those skilled in the art as to what the device is. It is the function of the court to legally interpret the claims, but what it describes to an expert will be of aid to determine whether or not the designation of a packer, as designated in the claim, means any particular packer of any physical or operable characteristic, or whether it means any type of packer to an expert. [425]

The Court: Perhaps we can save time on claim 7, Exhibit 1. Does the defendant claim it means any particular type of packer or does it mean any packer that will serve the purpose—any packer that will function as a packer?

Mr. Foster: Any packer that will function as a packer for the purposes described in the patent, yes, your Honor.

The Court: There is no invention claimed in the packer itself?

Mr. Foster: No, sir.

(Testimony of Frank E. O'Neill)

The Court: Doesn't that meet the question?

Mr. Mellin: That would as to one element.

The Court: As far as claim 7 is concerned.

Mr. Mellin: Claim 7 goes on, your Honor:

"In combination; a packer adapter when set to divide a well casing into upper and lower zones; and a gun means suspended from said packer in said lower zone; said gun means arranged to drive a projectile through the surrounding well casing."

I should like to, and I think I am entitled to ask the witness whether or not that describes, that description of the gun means describes to him any particular gun means or all gun means capable of accomplishing that function.

The Court: I will sustain the objection upon the ground it is clear to me. It does not describe any partic- [426] ular means. I do not need an expert on that.

Mr. Mellin: All right, your Honor.

Q. By Mr. Mellin: Now, with reference to claim 7, Mr. O'Neill, and directing you attention to Exhibits 22 and 24 in which you have illustrated—you have indicated the manner in which you would connect the Mims gun to the Simmons tester, and referring to those diagrams, I will ask you whether you find in that device which you have assembled together, a packer adapted when set to divide a well casing into upper and lower zones.

Mr. Foster: I object to that, your Honor. It is purely a question of law. It calls for a legal conclusion. It

(Testimony of Frank E. O'Neill)

inquires into a subject which is the exclusive province of the court in that it asks this witness whether the claim is infringed.

The Court: Any packer that functions as a packer is intended and will divide a well into upper and lower zones. That is the upper zone above the packer and the lower zone below the packer, wouldn't it?

Mr. Mellin: That is correct, exactly our contention, your Honor.

The Court: I do not need an expert to tell me that unless you think his answer should be in the record.

Mr. Mellin: I will withdraw the question, your Honor. [427]

The Court: By upper zone you mean the zone above the packer and by lower zone you mean the zone below the packer, don't you?

Mr. Mellin: Yes. What I wanted to do, your Honor, was to have this witness supply the elements of these claims to that combination to show the court that in each instance, in both of the patents, all of the elements of each of the claims is found when you tie a gun or screw a gun onto a tester.

The Court: It seems to me that would be the ultimate issue for the court to determine and not for an expert witness to supply.

Now, he can explain what these various claims mean to him as an expert or mean as an expert in the art, if there is anything needing explanation, but as far as claim 7 is concerned I do not need any help on that.

(Testimony of Frank E. O'Neill)

Mr. Mellin: All right, your Honor, because all the claims are almost precisely like that except stated in different language. [428]

* * * * *

Mr. Mellin: Before we commence, your Honor, may I again ask through the court, Mr. Foster whether or not he has the information as to the ownership by the defendant of the Mims patent?

Mr. Foster: We will have the data by two o'clock on that. I can state again, your Honor, the defendant did own the Mims patent at one time, I am sure.

Mr. Mellin: That is, some period from the expiration prior to that period?

Mr. Foster: Prior to that period and I will so stipulate, but I will get some specific dates. I think we had an exclusive license under it for a period of time and then I [447] believe we owned it but I will stipulate that we had either an exclusive license or title under the Mims patent, to which he refers, for a period of years prior to the expiration.

Mr. Mellin: And up to the date of its expiration?

Mr. Foster: And up to the date of its expiration, yes. [448]

* * * * *

Q. Now, Mr. O'Neill, in your experience in testing wells with the Johnston tester what was the range of the rise of fluid in the tubing during such tests?

(Testimony of Frank E. O'Neill)

A. The range of rise in the tubing would be—we always get a little fluid. That is due to the squeeze of the packer down in setting it so when the valve is open a little will come in, maybe only two feet and then it may be anything from there on up to the surface, depending on the source of the fluid and the pressure on the fluid.

Q. Now, in your experience is the rising of the fluid in the tubing through the tester to where the tubing is approximately full of fluid, a frequent or an infrequent occurrence in making such tests with the Johnston tester?

A. I would say it was an infrequent occurrence. It does occur, but infrequently where it rises to the full height [451] of the tubing.

Q. And usually when that occurs it is a matter of flowing through, through the tester—the pressure is sufficient to cause it to flow in?

A. Well, it is a matter of pressure, sir. If it is going to flow it would be termed a flowing condition that would flow over the top of the tubing and then on out.

Q. Now, when the tubing is substantially full of fluid, that is formation fluid, and the well bore and the tube surrounding it and the tool is substantially full of ordinary drilling mud or mud fluid, does the column of the formation fluid in the tubing balance the column of the mud surrounding the tubing?

A. No. The formation fluid would be of lesser specific gravity than the ordinary mud fluid.

(Testimony of Frank E. O'Neill)

Q. So that if the packer were to be released at that time and the mud fluid had access to the lower end of the tubing it would push up whatever was in the tubing until it would overflow the top of the tubing, is that so, until that weight was balanced?

A. At least until it was balanced.

* * * * *

Cross-Examination

By Mr. Foster: [452]

* * * * *

Q. In your opinion it is fairly practical to operate the gun perforator after setting the packer, for example, in the apparatus illustrated in the Spencer patent, Plaintiff's Exhibit 2?

A. Well, so far as to whether it is set first or after,—the packer is set before you shoot, or whether you shoot before you set the packer, in seating a hook wall packer in the casing, I can't see it matters what tool it is on. [508]

* * * * *

The Court: I can take judicial notice of that, Mr. Foster. If you drop an object down a hole or pipe it will fall faster than an object will through a liquid. Are you about finished? [566]

* * * * *

CECIL L. BARTON,

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

* * * * *

Direct Examination

By Mr. Mellin:

Q. Will you give your name, age, and residence, Mr. Barton?

A. Cecil L. Barton; 48; residence, 1635 Broadview Drive, Glendale, California.

Q. Have you any interest whatsoever in the outcome of this litigation? A. I have none.

Q. And are you by education and training a petroleum engineer? A. I am.

Q. And what has been your formal education in that regard, Mr. Barton?

A. I have a degree, a Bachelor of Science Degree, from the University of California at Berkeley.

Q. And what has been your practical experience as a [595] petroleum engineer, say, the last 16 years?

A. I have been employed by the State of California in the Division of Oil and Gas for the last 19 years.

Q. And what is your capacity, sir?

A. Senior Oil and Gas Engineer.

Q. And have you had any experience in connection with the formation testing of oil wells?

A. I have.

Q. And will you briefly tell us something of that experience and how you acquired it?

A. The Division of Oil and Gas requires that tests of water shutoffs be made on all strings of casing set over oil zones, and on the tests of those water shutoffs

(Testimony of Cecil L. Barton)

the Division requires that a representative of the Division be present.

Q. And you have been so present?

A. I have been present.

Q. Approximately how many times in such tests?

A. It would be impossible to say accurately. I would say that it would be in the hundreds.

Q. And is it a requirement of the Oil and Gas Division that the water shutoff at the shoe be practically a certainty before the operator is allowed to proceed?

A. It is.

Q. And that means that there must be an absence of [596] any water leaks at that point? A. Yes.

Q. Will you state whether or not you are familiar with the operation of formation testers of the type known as the Johnston Formation Tester? A. I am.

Q. And I am speaking now of the Johnston Formation Tester independently of any perforating guns.

A. Yes.

Q. And over what period of time, if you recall, have you been so familiar with such tools?

A. I have been familiar with the tool ever since they started operating in California. I could not give you the exact date.

Q. Have you witnessed or observed the samples taken by such tools during these tests, after these tests that you have witnessed? A. Yes.

Q. And by observing those samples you determine whether or not, in your opinion, the water shutoff has or has not been effected; isn't that so?

A. That is right.

(Testimony of Cecil L. Barton)

Q. In your experience have you witnessed any casing water shutoff tests made with such testing tools as I am talking about, the Johnston type, which showed by the sample [597] obtained to you that an effective water shutoff had been made, which test later proved erroneous?

A. Not that I can recall.

Q. In your experience and in these tests that you have witnessed have you witnessed any casing water shutoff tests made with testing tools of the type which we have been discussing which showed by the sample obtained that the cement job leaked, that is, that there was a leak in the casing and that no effective water shutoff had been made, which test later proved erroneous?

A. No; because we require that those wells be repaired in those cases.

Q. Have you witnessed tests made with the Johnston tester with a gun perforator connected to its lower end?

A. I believe that I have when it first came out up in the San Joaquin Valley. If I have, I think it has not been on more than one or two.

Q. Speaking of a Johnston tester without the gun, Mr. Barton, and assuming that in a tool of that character no means is provided to exclude the well fluid from entering the tool following the same path that the sample entered in the tool, so that the fluid in the tool and in its tubing always equalized with the mud fluid in the well, in your opinion would or would not such a tool be of any practical benefit in testing a well for water shutoff? [598]

* * * * *

(Testimony of Cecil L. Barton)

The Court: Isn't it accurate to say that the plaintiff's contention with respect to infringement is that if the invention is as broad as the inventor claims it to be, the plaintiff infringes it?

Mr. Mellin: And if the claims are valid and if the claims are applied literally, yes, your Honor; I think it is [605] fair to say.

The Court: Well, that is the breadth of the inventor's claims, isn't it?

Mr. Mellin: And if the claims are valid. [606]

* * * * *

The Witness: My answer to that would have to be no.

Q. By Mr. Mellin: And would you state your reasons for your answer, Mr. Barton?

A. Well, in testing a water shutoff on a string of casing that has been cemented in the well, it is necessary to obtain a sample of fluid which comes into the drill pipe or tubing during the time the valve is open, and which is below the point at which the packer is set. If the fluid behind the drill pipe or tubing were allowed to be equalized after the packed was released, it would be impossible to identify the character of the fluid which entered during the time the valve was open.

Q. Have you finished your answer, Mr. Barton?

A. Yes.

Q. Now, in making a water shutoff test by a tester of the type of the Johnston formation tester, assuming that the packer is tight and set and the tool is open to take a sample, and thereafter the packer is released and the mud fluid in the well under the hydrostatic head has free

(Testimony of Cecil L. Barton)

access to flow into the tool following the taking of the test sample, and the fluid in the tool equalized with the mud fluid in the well bore, in your opinion would or would not such a test be of any practical benefit in determining whether or not a water [614] shutoff had or had not been effected? A. No. [615]

* * * * * * * *

Redirect Examination

By Mr. Mellin:

Q. Mr. Barton, speaking of the flowing well, it is known that it is going to flow before anything is run into the well, how long has it been the practice to flow a well in through an ordinary tubing with a packer below?

A. I don't know. It is usual—under those conditions they sometimes complete a well after casing has been set; a well is sometimes completed by running tubing on a packer, seating the packer.

Q. And in that instance they are anticipating the flowing well? A. That's right, yes.

Q. Now, to your knowledge, how long has it been the practice to test for water shutoffs by bailing?

A. Well, that would be practiced years ago. In recent years I don't believe that we have one test of water shutoff by bailing out, of, oh, 500 possibly.

Q. Now, is it a fact or is it not a fact that what we [636] call formation testers today were the things that supplanted the bailing tests? A. That's right.

Q. In other words, the bailing practice of testing is the antiquated method of doing it?

A. That's correct.

(Testimony of Cecil L. Barton)

Mr. Foster: That is objected to, your Honor, as suggestive and leading, and is argumentative, and I move it be stricken.

The Court: He has answered. It is his opinion as an expert. Overruled. Motion denied.

Q. By Mr. Mellin: Now, in connection with the tool that Mr. Foster was asking about, and that is the tool in which if you break the packer the hydrostatic head can come up into the bottom of the tool following the sample,—with a tool of that sort could you ever determine, in your opinion, whether a water shutoff had been effected?

A. I don't believe so. Normally, no.

Q. You could tell if it had not been effected?

A. You could tell if it had not been effected.

Q. But you could not tell if it had been effected?

A. Normally, no. [637]

* * * * *

Recross Examination

Q. By Mr. Foster: You stated you believed you had on one occasion observed the operation of the combination Johnston perforator and formation tester. Does the operation of [643] that combined tool have any advantage to your mind over the operation of a gun perforator separately being run in on a cable and withdrawn, and then a formation tester being run in separately and withdrawn?

A. Not as far as we are concerned.

Mr. Foster: That is all.

(Testimony of Cecil L. Barton)

Redirect Examination

By Mr. Mellin:

Q. As a matter of fact, Mr. Barton, isn't it so that even today, and to your knowledge, testers are still being run without the—being run in directly attached to a gun? [644]

Mr. Foster: Objected to.

The Court: Sustained. Reframe it.

Q. By Mr. Mellin: Mr. Barton, will you state whether or not, if you know, testers are run today without being run as connected with a perforator?

A. They are; yes.

Q. And as far as your information is concerned, in what proportion would you say that testers are run without being connected with a gun to those that are run connected with a gun, if you know?

A. I don't know what proportion.

Mr. Mellin: That is all.

Mr. Foster: One question.

Q. You could get an effective test telling that you had water shutoff and the water shutoff had been effected, by a bailing operation with this tool I have described, which permits the annulus of mud to enter the tubing behind the sample after the packer is broken, provided you performed the bailing before the packer were unseated?

A. Yes. That would be the same operation as tubing set on a packer.

(Testimony of Cecil L. Barton)

Q. By Mr. Mellin: In other words, you could accomplish by running a straight tubing down and set a packer around the tubing and then bail for the test, could you? [645]

A. That is right. It would be the same type of test.

* * * * *

Mr. Mellin: At this time, your Honor, I would like to read into the evidence the testimony of—I might tell the court that it was stipulated between counsel for the parties that if Mr. Wilfred G. Lane were called as a witness on behalf of the plaintiff, he would testify as follows:

“Q. Will you give your name, age and residence, Mr. Lane?

“A. W. G. Lane, 62 today; this is my birthday: residence 1554 Hill Drive, Los Angeles 41.”

Mr. Mellin: Through the court, may I tell the reporter that I will give him this document and he does not have to be concerned if I go too rapidly.

The Court: No objection to the reading of it?

Mr. Foster: No objection, your Honor. I just notice something here. May I address Mr. Mellin through the court? This deposition was taken sometime ago. I am not willing to stipulate that Mr. Lane, if called today, would say today was his birthday. As the date of the deposition, it was his birthday.

Mr. Mellin: As far as I am concerned, your Honor, that [646] can go out.

"Q. What is your occupation?

"A. Retired. I am the busiest retired man you ever saw in your life.

"Q. What was your occupation before you retired?

"A. Lane-Wells Company.

"Q. In what capacity?

"A. Operating vice-president.

"Q. Do you have any interest in the Lane-Wells Company?

"A. Yes, a stock interest only.

"Q. You are the W. G. Lane who is named as patentee in the patent in suit here, No. 2,029,491, patented February 4, 1936, a copy of which I hand you?

"A. That's right.

"Q. And at the time you applied for that patent, Mr. Lane, you believed, of course, that you had made a patentable invention, did you not?

"A. Yes.

"Q. And you are still of that opinion?

"A. I have had no reason to change my mind.

"Q. Do you feel that the validity of that patent should be sustained?

"A. I can best answer that the same way. I know of no reason why it shouldn't. [647]

"Q. This application was filed, Mr. Lane, on August 25, 1934, but it was a continuation in part of a prior application filed December 20, 1932.

(Deposition of Wilfred G. Lane)

What, if any, experience had you had in formation testing prior to December 20, 1932?

"A. Let me ask you this question: When you say what experience had I had, do you mean actual experience of my own?

"Q. I think that would be so, yes.

"A. None of my own.

"Q. What, if anything, was Lane-Wells doing, say, just prior to December 20, 1932, in connection with perforating guns, as you knew them?

"A. We were developing it.

"Q. Were you commercializing it?

"A. No, because we hadn't got that sufficiently developed by December, 1932, for commercial exploitation.

"Q. Do you recall when you did have it so sufficiently developed, approximately?

"A. I think my recollection is—and again it is a matter of statistical record, which you can easily check—that the first well that we ever run a test gun into was in December of 1932, down on the Dominguez lease of the Union Oil Company. [648]

"Q. Was that gun run in in connection with a formation tester, or just run in on cable by itself?

"A. The gun only.

"Q. The gun only?

"A. Yes.

"Q. Do you recall any circumstances that gave rise to your inventing this combined gun type formation tester that is shown in this patent which I have shown to you?

"A. At the time that the gun itself was being developed, and after I had demonstrated to a bunch

(Deposition of Wilfred G. Lane)

of oil men that electrical control at the top of the hole was safe and feasible, it was the thought down at Lane-Wells that we ought to tie up—you know what I mean by that, in patent terms—every possible application that the gun might have, every application that it might have and every means by which it might be operated.

“Q. In other words, you mean by ‘tie up’, to make a monopoly by means of patents?

“A. Well, I don’t like the word ‘monopoly’, but, for the want of a better word, yes.

“Q. In other words, to try to cover it by patent?

“A. Yes, to protect ourselves as completely as possible. [649]

“Q. And so that gave rise to this invention that is disclosed in the Lane patent that you have been referring to?

“A. That is right.

“Q. And this thought of combining the gun and the formation tester was an original idea with you, or was that an end to work toward, from an engineering standpoint?

“A. It was an original idea with me, to this extent, that, being a trained engineer, I couldn’t see any sense in so much back motion, so much lost motion; I couldn’t see anything to be gained by running a perforator in and coming out of the hole, and running a tester afterwards, and the thought occurred to me, why not do them both at once. It was the reasonable thing to do.

(Deposition of Wilfred G. Lane)

"Q. And, as a trained engineer, that advantage over prior methods was before you?

"A. Yes. I am a graduate electrical-mechanical engineer, and in 1936, I got my Master of Engineering degree.

"Q. Did any one work with you on the design of the dual device shown in this patent that we have been discussing?

"A. As far as the design and development was [650] concerned, probably everybody in the organization had a hand in it. We were all coordinated together down there.

"Q. Your contribution, however, was the bare thought of combining the gun and the formation tester in one tool?

"A. Yes—the sketching out of the way in which the gun could be operated without the use of the electric cable on which the perforating gun had, up until that time, been run.

"Q. To your knowledge, Mr. Lane, was a combined tester and gun ever produced by the Lane-Wells Company?

"A. I left Lane-Wells in 1938.

"Q. I am talking about to your knowledge.

"A. I was going to say, to my own personal knowledge, I don't know.

"Q. Was any combination gun and formation tester made by Lane-Wells during the time you were closely associated with them, prior to your termination?

"A. Again I will have to say this: We had a research department down there. We also had this Technicraft Engineering Corporation down

(Deposition of Wilfred G. Lane)

there, which was more or less in charge of our research department, and they would take ideas that Tom, Dick [651] or Harry might suggest at our round table meetings and take them over and try them out in a sort of embryonic way, and that may have been done without me knowing it.

"Q. To your knowledge?

"A. To my knowledge, no, sir.

"Q. To your knowledge, no combined tester and gun was ever used commercially?

"A. Not to my knowledge, no." [652]

* * * * *

Now, if your Honor please, I have a very short deposition to read into the record, that part of the record of the testimony of Mr. Rodney S. Durkee.

The Court: How do you spell that last name?

Mr. Mellin: D-u-r-k-e-e-. [655]

* * * * *

"Q. Give your name, age and residence, Mr. Durkee.

"A. My name is Rodney S. Durkee; 59; 597 San Marino Avenue, San Marino, California.

"Q. What is your occupation?

"A. President, Lane-Wells Company.

"Q. That is the defendant here?

"A. Yes.

"Q. How long have you been associated with the Lane-Wells Company in that capacity?

"A. I have been president since 1939. Prior to that time I was one year with the company. [658]

(Deposition of Rodney S. Durkee)

"Q. Is it part of Lane-Wells' business to render service of gun perforating wells?

"A. Yes.

"Q. And that service has been offered by Lane-Wells all during the time you have been associated with them?

"A. Yes.

"Q. And would you say that that was the major part of Lane-Wells' business or not?

"A. Yes, a substantial part."

Page 24.

"Q. The Lane-Wells Company does not sell perforating guns, as I understand. They render service in which the guns are used?

"A. That is correct."

Then skipping to line 10, Mr. Foster.

"Q. Does the Lane-Wells Company manufacture, sell or use or rent a formation tester service?

"A. No.

"Q. Have they done so at any time while you have been connected with them?

"A. No."

Skipping to page 28:

"Q. During the time you have been associated with the Lane-Wells Company, has the Lane-Wells Company [659] made any devices for formation testing?

"A. We have not manufactured any and put them into commercial use. We have been experimenting with and constructing structures of various kinds over a period of years.

(Deposition of Rodney S. Durkee)

"Q. Are those testers combined with a gun, or just simply testers?

"A. As far as I know, all of them are looking toward the combination of the tester and the gun.

"Q. As far as commercial use it concerned, the Lane-Wells Company, during the period you have been with them, have not commercially put out, for use, any combined formation tester and perforating gun?

"A. That is correct.

"Q. Or any formation tester by itself?

"A. That is right.

"Q. How long, would you say, approximately, has this experimenting with testers been going on?

"A. Well, to my knowledge, ever since I have been with the company. How long before that I don't know—1938.

"Q. It has been continuously during the time you have been there?

"A. Yes, with the exception of the interruption caused by the load on our engineering department [660] during the war."

* * * * *

Mr. Foster: May I reserve the right, your Honor, after I have read the entire deposition to offer additional portions, or to require Mr. Mellin to do so, in accordance with the Rule? [661]

* * * * *

Mr. Foster: May the record, your Honor, which Mr. Mellin has read or the excerpts he has read into the record, may the record show adjacent to that that this deposition was taken February 18, 1947, because Mr.

Lane would testify differently now and to the effect that the Lane-Wells Company had built a successful operative combined gun perforator and formation tester at this date? [662]

* * * * *

Mr. Mellin: May I respectfully read into the record part of the deposition of Walter T. Wells, who is the chairman of the Board of the Lane-Wells Company? [663]

* * * * *

"Q. Give your full name and residence.

"A. Walter Todd Wells, 5222 North Vista La Jana Lane, La Canada.

"Q. What is your occupation, Mr. Wells?

"A. Chairman of the Board, Lane-Wells Company,

"Q. That is the defendant-counter-claimant here?

"A. Yes, sir.

"Q. How long have you been associated with the Lane-Wells Company?

"A. Since it was founded, in 1932."

And I skip to page 7, line 2.

"Q. When did the Lane-Wells Company go into the business of casing gun perforators?"

Mr. Foster: That is objected to as immaterial.

The Court: Overruled.

Mr. Mellin:

"A. To perforate our first commercial well, in January, 1933.

(Deposition of Walter T. Wells)

"Q. Where was that—here in California?

"A. It was at Santa Fe Springs.

"Q. And the Lane-Wells Company have been in that business of making and operating casing gun perforators ever since, haven't they? [664]

"A. That's right."

And at line 26:

"Q. At that time was anyone else perforating by the use of gun perforators in California fields, to your knowledge?"

Mr. Foster: Objected to as immaterial.

The Court: Overruled.

Mr. Mellin:

"Q. At that time—let's make it the first part of 1932.

"A. No, I don't think so."

Skipping to the top of page 10.

"Q. I hand you patent No. 2,029,491, in suit, and ask you if you are generally familiar with the device there disclosed?

"A. Yes, generally. I haven't seen the patent itself in years.

"Q. That patent is directed to what is alleged in there to be a combined gun perforator and formation tester?

"A. It is called a gun type formation tester, yes.

"Q. Can you tell us whether or not the Lane-Wells Company, or anyone else on behalf of the Lane-Wells Company, ever built a structure such as shown in that patent? [665]

"A. I wouldn't know.

(Deposition of Walter T. Wells)

"Q. To your own knowledge, no such have been built?

"A. I have never seen one.

"Q. Had one been built in the Lane-Wells Company plant, you would have known it, wouldn't you?

"A. No. We build a lot of things down there that I don't know about.

"Q. But as far as you know, they have never built one as shown in this patent?

"A. No.

"Q. To your knowledge, has the Lane-Wells Company, or anyone in your behalf, built a tool in which a gun perforator and tester were combined in one tool?

"A. We have been working on a tool like that for an extended period of years, but how many models or specimen devices have been built, I don't know.

"Q. You never built one commercially and used it commercially?

"A. We have never offered it to the oil service as yet." [666]

* * * * *

"Q. I notice the patents were originally issued to [667] the Technigraph Engineering Corporation. Was that a corporation wholly owned by the Lane-Wells Company?

"A. Yes, sir.

"Q. And the inventor mentioned as inventor in patent No. 2,029,491, he was one of the majority stockholders in the Lane-Wells Company, was he not?

"A. He owned a 50 per cent interest at that time.

(Deposition of Walter T. Wells)

“Q. I beg your pardon. And Mr. Lloyd Spencer at that time, on May 1, 1935, was an employee of the Lane-Wells Company?

“A. That’s right.”

Skipping to line 17 on page 18:

“Q. From your knowledge of the oil field business, Mr. Wells, has there been any need in the oil fields for a combined gun and tester during the period, say, commencing in 1932, to the present time?

“A. I don’t know what the oil fields need.

“Q. As far as you know, there wasn’t any such need?

“A. Well, I am not close enough to the oil operators to know what they actually need.

“Q. If there was such a need, you would know of it?

“A. I probably would have heard of it.”

Page 19, line 17:

“Q. I guess the answer is, then, that, as far as you know, there has been no need in the oil [668] fields of California for a combined perforating gun and tester?

“A. Well, I felt that a tool of that type that was properly designed and engineered, that would save time and be safer for the company to operate, would be of commercial advantage.

“Q. But the separate running of the gun perforator and then the subsequent running of the tester satisfactorily handled the problem up to now, as far as you are concerned?

“A. Well, they have gotten along, I think, with those devices.”

Mr. Foster: May I have a similar reservation that I had with respect to the Durkee deposition? [669]

* * * * *

JAN LAW,

called as a witness by defendant, being first sworn, was examined and testified as follows:

* * * * *

Direct Examination

By Mr. Foster: [713]

* * * * *

The Witness: I have poured into the graduate cylinder a quantity of fresh water, approximately 235 cubic centimeters. Into the graduate cylinder I have put a piece of bentonitic material. The reading on the graduate is now 265 ccs., the difference representing the volume of rock material placed in the graduate.

Mr. Mellin: May I have the record show, your Honor, or have by the witness, that the material he placed in the glass is free from water when he put it in?

The Witness: Free from water. Any exposure to atmosphere, there is water-vapor in the atmosphere. To answer your question with a "yes," sir, would require that this had been kilned or dried in an oven, and that is not the case.

Mr. Mellin: Except for kiln-drying, it has not been previously submerged or subjected to contact with fresh water?

The Witness: Not since it came into my possession from [754] the Bariod Sales Division of National Lead Company. [755]

* * * * *

(Testimony of Jan Law)

A. I have a publication, the Bulletin of the Agricultural and Mechanical College of Texas, issued September 1, 1944. It is a bibliography on the Petroleum Industry, edited by E. DeGolyer and by Harold Vance. In this bulletin, which is strictly a bibliography, they have certain titles: The discussion of drilling fluids in general. They refer to 44 articles appearing in magazines and transactions of A. P. I., A. I. M. E. and others.

Under the title "Property of Drilling Fluids and Methods of Determining them," they have 45 articles.

"Drilling Problems Related to Mud Control," 39 articles.

"Filtration Characteristics of Drilling Muds," the first entry is 1932 in this bibliography, the last entry is 1941; there are 22 articles referring to filtration characteristics of drilling mud.

On "Viscosity-Gel Properties of Drilling Mud," they have 23 items.

"Chemical Treatment and Gel Enrichment," 14 items.

"Salt Water Muds," three articles.

"Ingredients of Drilling Fluids," 18.

"Mud Fluid Reconditioning Devices and Methods," 19.

And conversely, for methods of removing mud, mud cake, in an attempt to alleviate the damage caused by mud, they [793] have under a title "Cleaning and Preparing Wells; Well Conditions Affecting Yield," they have 26. All 26 are not necessarily concerned with removal of mud alone; some of them refer to paraffine and sand.

* * * * *

A. One more item: "Clean Out Methods and Results in Particular Fields and Areas." That, also, would not

(Testimony of Jan Law)

necessarily be the—the 24 articles would not necessarily treat exclusively with mud, but would be concerned with other materials that needed to be cleaned out.

Mr. Foster: The publication, the print of the title sheet of the publication and those pages of the publication listing the articles by title, to which the witness has referred in his last answer, is offered into evidence as Defendant's Exhibit 1. [794]

The Court: Is there objection? Is there objection?

Mr. Mellin: No, your Honor.

The Court: Received into evidence.

Q. By Mr. Foster: Are you aware, Mr. Law, of any measures which have been taken in the past to avoid the damage done to sands by reason of fresh water invasion or to reduce that damage?

A. Yes. One of the earliest, one of the most common, is to treat the mud to what I have stated earlier is the difference between a good mud and a poor mud, the addition of admixtures to the mud such as to reduce the filtration, therefore, reduce the amount of mud cake formed; and also to treat that mud for the purpose of producing a mud cake which is the easiest to remove.

The Court: Is the best mud the one that has the least degree of filtration or lowest rate of filtration?

The Witness: Yes, your Honor.

The Court: In other words, the best mud is the mud that will hold its water, is that it?

The Witness: Yes, your Honor. Concurrent with holding the water it follows that the mud cake will be the thinnest; it will perform both operations of producing a thin mud cake and producing a small amount of infiltration.

(Testimony of Jan Law)

Then other measures are to depart from fresh water drilling muds and use, for instance, oil base muds, in [795] which an oil base mud is made up of certain solids and oil in the absence of water. A result is that the filtration which may take place will be oil infiltration rather than fresh water infiltration.

A third measure has been the use in the past of salt water base muds, in which the invading fluid, the infiltrating will be salt water rather than fresh water.

At times, where it is possible, they have used as a drilling fluid oil alone to circulate the material and to help perform the drilling operations.

Those are expedients, means of reducing the damage to sands. They perform other functions as well, not limited exclusively to the prevention of damage.

Q. By Mr. Foster: You mentioned a salt water base mud, and earlier in your testimony you referred to the deflocculating property of salt in the mud. What is done in those salt water muds which you last referred to, if anything, to prevent that deflocculating effect?

A. One of the well known commercial products is an Empermex put out by Baroid Sales of the National Lead, in which the solids are, for the most part, starch, treated in such a manner as to produce a material which, in the absence of salt water, will not settle out.

Q. Is it more or less expensive to use these muds you have described, instead of the water base mud in oil field operations? [796]

A. In general, the cost of the mud itself per unit volume is greater for an oil base mud as compared to a fresh water base mud.

(Testimony of Jan Law)

Q. Is that true also of the other muds, the salt water base mud and chemically treated mud?

A. Well, a chemical treatment is an additive to a natural clay and water. It is an expense item over an untreated mud. The salt water starch is more expensive than is clay and water.

Q. Can you give us an idea of the relative expense, assuming, if you will, a well depth of 7,000 feet with 8-5/8 inch casing and one change of the drilling fluid during the drilling operations? Can you give us an approximation of the cost of the oil base muds?

A. The oil base mud sells for approximately \$8.50 a barrel. A simple clay in water suspension mixture, which would not be used on a 7,000 foot well by a prudent operator, he would make certain additives to it, so that I would estimate the cost of the clay and the additives to produce a reasonably good quality of mud that it would cost about from \$1.25 to \$1.75 a barrel, as opposed to the \$8.50.

Now, the volume in 8-5/8 inch casing at 7,000 feet, if my memory is right, I believe that one barrel fills about 25 feet. I can be wrong on that, but the process would be so many barrels times \$8.50, as against so many barrels at, say, [797] \$1.50 or \$1.75.

Q. Are the crews paid the same amount with the operations involving the use of oil base mud as when the operations involve the use of water base mud?

A. The most spectacular case I heard of, of crews receiving more money, was during the war, and because the oil base mud is very damaging to clothes, and very mean and awkward to work around, the crews in the Wilmington Field, and that would be a 24-hour series of

(Testimony of Jan Law)

men, five men to a crew and for three eight-hour shifts, received a bonus of \$35 a day for working with oil base mud. It is my understanding that at the present time the bonus for working with oil base mud as compared to water base mud is about \$11 or \$12 a day.

Q. Is there any greater danger to the crews working with oil base mud than with water base mud?

A. The material is burnable, it is inflammable, being oil base. The exact flash point, and so on, is rather carefully controlled, but it is subject to being burned and subject to catching on fire, as opposed to the perfectly safe fresh water mud. [798]

* * * * *

Cross Examination

By Mr. Mellin:

Q. Mr. Law, you testified, as I recall it, that there would be a difference of approximately eight hours saved in the running-in of a combined tester and perforator and the running-in of a line gun and followed by a tester run in on tubing; is that your testimony?

A. There are two savings of time, and I am attempting to recall. One would be a saving in rig time and the other would be a saving in the time elapsed of exposure of the formation to fluids.

Q. I am speaking now, not on the time in which the formation is exposed to the pressure of the mud fluid. I am speaking solely of the time which you state was saved by running a combined tool rather than two tools individually. To refresh your memory, I will read your testimony on it.

(Testimony of Jan Law)

The Court: As I recall, the witness testified it would be a 12-hour loss of time in putting the two tools into the well to complete that operation.

Q. By Mr. Mellin: How long would it be? [862] How much would you save and what would be the difference in saving of time—not of the pressure on the formation—but of the running in of the combined tool as compared with the running in of the two tools?

Mr. Foster: That is objected to as indefinite unless the depth of the well be given.

Mr. Mellin: 11,000 feet.

A. It would be the length of time required to rig up the gun perforator on a cable, run it into the hole and remove it from the hole, and remove equipment and rig up necessary for the running of the gun. And at 11,000 feet on an ordinary performance, I imagine that that performance would take some eight hours or so. That time would be saved.

Q. How much would it take for the combined tool, the time to run that in and out? You would not save all of the eight hours, would you, Mr. Law?

A. I limited it in my description to the time necessary for discharge of the gun, saying that that was comparable to both instruments, the time of discharge. Now, the length of time required to run a combination gun to 11,000 feet, is that your question, sir?

Q. I want to know how much time you save, what is the difference in time of perforating and testing by running a gun separately from the tester, and then running the tester, as compared with running a combined gun and tester. [863]

(Testimony of Jan Law)

Mr. Foster: That has been answered. That was precisely the question Mr. Law answered, it would be eight hours, about eight hours.

The Court: Sustained.

Q. By Mr. Mellin: The running of the combined tester and the gun, the time required for that would be comparable to the time in which it would take to rig up and run a tester by itself and pull out; isn't that so?

A. You are speaking now of just running time, running in the hole and pulling out, and not the time incident to the discharge or the time of taking the test, but strictly running time?

Q. All right. Let us take the running time, first.

A. It would be the same whether or not you had a tester alone on the hole or whether you had a gun and tester, with the exception of maybe some rigging up time, depending on how the equipment was delivered at the rig.

Q. In other words, in the combined tester and gun, if anything, there would be a little more rigging up time, wouldn't there?

A. Combined tester and gun?

Q. You would have a little more rigging up time, if anything, it would never be less?

A. Never be less.

Q. And the rigging up time of the tool would be almost [864] comparable, wouldn't it?

A. Well, I have never witnessed the operation on the rig of the running of a combined tool. I don't know how many pieces it is delivered to the rig in.

(Testimony of Jan Law)

Q. Well, you have testified that you would save approximately eight hours by running that in, instead of the two separately. What was that based on?

A. The length of time it requires to run a gun on the cable, discharge it and remove it from the hole, since, if you use a tester alone, you have to run it in the hole. If you use a combination gun, you have to run it in the hole. The difference between running the two is the trip in and out of the hole and expense of rigging up, associated with the gun on a cable.

Q. It is your testimony that it would take eight hours to run a line gun in and out 11,000 feet, fire and pull out?

A. If I have so testified, I have testified in relation to an average job at 11,000 feet.

Mr. Mellin: Will you mark this for identification?

The Clerk: The document will be marked 32 for identification, a one-page document.

Q. By Mr. Mellin: I show you a paper which counsel served on me, entitled "Lane-Wells Company" and "Summary of Perforating and Operating Time on Kings County Oil Co. [865] Von Glahn No. 1", giving a list of wells, and at the bottom it says: "Average Total Job Time for one perforating operation involving one traverse of the well 2 hr. 52 min. at an Average Depth of 10,476" feet. In view of that would you change your testimony from eight hours to two hours and 52 minutes?

A. No, sir.

Q. It is still your opinion, then, that it takes eight hours to run a perforating gun in and out of the hole and the rigging up time to perform it?

A. I have testified as to the average job at 11,000 feet. That includes dummy runs, feeling runs. The 11,000 feet being an unusual depth often requires that the

(Testimony of Jan Law)

gun be run in the hole to establish the stress in the line, the stretch in the line, such that a recording and depth measured at the bottom of the hole and that string can be returned to the surface of the hole and the two checked out at zero.

I am referring to a situation in which a gun perforator truck moves from well to well in the course of its normal business and comes to an average well at 11,000 feet.

Q. Would you say there would be a material difference between a well at 10,476 feet and 11,000?

A. I would not.

Q. They would be comparable, would they not?

A. They would. [866]

* * * * *

The Witness: I think, your Honor, that there are two eight-hour periods under consideration. One eight-hour period could be considered rig time, which is concerned with the lowering of the gun on the cable and the removal; the other eight-hours is considered the time of exposure of the sand to the mud fluids within the well bore. The second eight-hour period is occasioned by the time elapsed following perforation, the removal of the gun from the hole, the assembly of the tester and the lowering of the tester in the hole, the setting of the tester, opening it. That eight-hour period is exposure to mud.

The previous eight-hour period is rig time consumed in running in the gun and removing it.

Does that answer your question? [869]

* * * * *

The Court: I did not understand that he had ever said that there was a saving in every case; but I understood

(Testimony of Jan Law)

him to say it would take eight hours in a normal case to run a gun in on a string or a cable and fire it, perforate the casing, and bring the gun back out and dismantle the rigging. Is that correct?

The Witness: A normal case, at 11,000 feet, with normal equipment and usual operation. [870]

* * * * *

The Court: Do you desire, Mr. Foster, to offer Defendant's Exhibit D for identification, which is a paper written by the witness, as I have a note on it?

Mr. Foster: Yes; I will offer that into evidence.

The Court: Is there objection to it?

Mr. Mellin: No, your Honor.

The Court: Defendant's Exhibit D for identification received into evidence. Defendant's Exhibit E for identification is a rock sample. Do you offer it?

Mr. Foster: I offer that into evidence, your Honor.

The Court: Is there an objection?

Mr. Foster: Is Plaintiff's Exhibit E—that is a piece [872] of rock?

The Court: Well, it is a sample, is it not?

Mr. Foster: Of bentonitic material.

The Court: Of the montmorillonite which you have been speaking about?

Mr. Foster: Yes.

The Court: Received into evidence, Defendant's Exhibit E for identification.

Do you offer Defendant's Exhibit H for identification, which is a government bulletin, I believe?

(Testimony of Jan Law)

Mr. Foster: Yes; I offer that into evidence as Defendant's Exhibit H.

The Court: Received into evidence. Do you desire any data to be shown on this test?

Mr. Foster: Thank you, your Honor. That was my next request. Would you step down, Mr. Law, and describe the swelling, if any has occurred, and give us an approximation or give an indication of the approximate volume of the bentonitic material that you placed in there at 10:15 this morning, in fresh water, note being taken that it is now about 3:30 p. m.?

The Witness: In order to measure the volume it is necessary to make some kind of a visual netting of the amount of material, solids, opaque material within the graduate. There has been a visible swelling of the [873] material, and I imagine that the material could net, that is, by a visual cut and fill process, of something around 75 or so cubic centimeters of material now exists as an opaque, swollen rock.

The Court: As against how many when it was put in this morning?

The Witness: Those figures are available, your Honor.

Mr. Foster: I have them.

The Court: Well, they are in the record.

Mr. Foster: Yes; they are, your Honor.

The Court: Is that material which is in the test tube or in the graduate which you have testified about, is that from the same rock of which a sample is marked here in evidence as Defendant's Exhibit E?

The Witness: From the same rock? It is from the same sack and from the same group of rocks.

The Court: The same type of material?

(Testimony of Jan Law)

Mr. Foster: Yes.

The Witness: Yes, your Honor.

Mr. Foster: That was 30 ccs. this morning, I am told by Mr. Kern, who checked the record.

I thought perhaps your Honor might care to observe particularly the type of this, the manner in which it grows in a flower-like material to indicate swelling. The court will recall that it was more or less a smooth rock, without [874] these sprouting flower-like protuberances on it when it was placed in there, looked like the rock in evidence.

The Court: That is montmorillonite, is it?

Mr. Foster: Yes, your Honor.

The Court: The same thing that has been referred to here today?

Mr. Foster: As present in sand formations producing oil; yes, your Honor.

The Witness: I would prefer, your Honor, to call it a montmorillonite type; and if one can be involved in rock specie, that maybe there is only one montmorillonite rock, and that is located in France. But this is a rock which may be called montmorillonite type, which very closely resembles that rock found in a certain portion of France.

The Court: What do you call it here in America?

The Witness: We call it bentonite, swelling bentonite, or a montmorillonite rock, loosely used. [875]

* * * * *

Mr. Mellin: May it be corrected that way?

Mr. Foster: That is perfectly satisfactory.

The Court: Striking the word "formation" and substituting the words "well bore"?

Mr. Mellin: Or "well."

(Testimony of Jan Law)

The Witness: "Drilling fluid."

Mr. Mellin: "Drilling fluid" would be more satisfactory.

The Court: Drilling fluid. Very well. The word "formation" is stricken and the word "drilling" is substituted.

The Witness: In that case, if it is "drilling fluid" the answer would be "Yes."

Mr. Mellin: That is correct.

Mr. Foster: May I say, your Honor, these are not reporters' mistakes. They are the mistakes of the witness and they are caused by the clumsy manner, I think, in which I framed the questions.

Then there is one question that I asked on page 822 of the record, which I believe might be misleading. In this question I was attempting to recapitulate the testimony of the witness as to the ill effects of the water in the formation impeding the entrance of the formation fluids. In item 4, "diluting or masking the sample," of course, is not a factor of impedence, and the witness did not so testify, that [884] the dilution or masking did impede. I misstated his testimony in framing that question. To be accurate, the clause No. 4 should be omitted.

The Court: Do you desire to strike it from the question?

Mr. Foster: I would prefer to do so, if I might. The answer did not adopt it.

The Court: Is there objection?

Mr. Mellin: I don't see any.

The Court: Then item (4) will be stricken from the first question on page 822 and item (5) will be re-numbered (4). [885]

M. O. JOHNSTON,

called as a witness by the defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: You are the Mr. M. O. Johnston who has heretofore been sworn, are you not?

The Witness: Yes, sir.

The Clerk: You were sworn the other day?

The Witness: Yes, sir.

The Clerk: Be seated.

By Mr. Foster:

Q. You are the same Mr. Johnston who was previously sworn and testified, and are the president of the plaintiff company; is that correct? A. Yes, sir.

Q. Your counsel has produced, in accordance with my request, one sheet entitled, "Record of Combined Gun and Tester Runs," which I understand to be the record of all of the runs of your combined tool, which have been performed by the plaintiff company; is that correct?

A. Yes, sir.

Mr. Foster: I offer that in evidence as Defendant's Exhibit P.

The Court: Received in evidence. [1022]

Q. By Mr. Foster: I notice from Exhibit P, Mr. Johnston, that your first runs of the combined tool are in January 1946 to the number of seven, and that the number grew consistently through the 12 months of 1946. Isn't it a fact, Mr. Johnston, that the plaintiff company experienced great sales resistance, great opposition by the industry in attempting to introduce this combined tool into use, and that the plaintiff company succeeded in having this business grow in the manner here reflected only by overcoming that great sales resistance and opposition by

(Testimony of M. O. Johnston)

extensive advertising and sales effort and exploitation and education?

A. Well, there was quite a bit of sales resistance until we could show them that we could shoot and test at the same time.

Q. In other words, this combined tool was such a departure from the tools that had gone before and had been used before, that you had a very substantial opposition to its use to overcome in the industry in order to have this number of uses reflected by Exhibit P?

A. No, we didn't have very much opposition.

Q. Well, isn't it a fact that you spent a great deal of money in advertising to secure these uses?

A. No, sir, not very much.

Q. How much would you say in the two years covered since January, 1946? [1023]

A. Well, I couldn't say, Mr. Foster, because the advertising that was done was by field work, the men talking it. So I really couldn't say how much.

Q. Would you say several thousands of dollars?

A. I imagine so, yes, sir.

Q. When did your first ad appear in any publication with respect to the combined tool?

A. I am not sure of that. I think it was this year.

Q. How many salesmen did you have attempting to persuade the industry to use this combined tool?

A. Oh, that was most everyone that was testing and the men that were in charge of the districts.

Q. Did you have any salesmen who acted only as such in attempting to introduce this combined tool?

A. Yes, we did part time, in Texas.

Q. Did you have any here in California, in this area?

A. Not entirely; not devoted entirely to that.

(Testimony of M. O. Johnston)

Q. In other words, you used the organization you then had to give publicity by word of mouth to the industry with respect to the combined tool?

A. That is correct.

Q. And after you had demonstrated this to any operator in the oil industry, then that sales resistance and opposition was eliminated, and he readily accepted the tool for subsequent use; is that correct? [1024]

A. Yes, sir, that's true.

Q. So that, as regards the California operations in 1946, you were able to have a total of 687 uses of the combined tool, without employing any salesmen or without advertising in any publications to the industry; is that correct?

A. I believe we hired one man that was partly on that in California.

Q. In 1946? A. I think so, yes.

Q. That is to acquaint the industry with the advantages of the combined tool? A. That's correct.

Q. The Texas Company to which you referred is the Johnston Oil Field Service Corporation, the Texas corporation; is that correct? A. Yes, sir.

Q. And they have used a combined gun perforator and tester in all manners identical with the gun perforator and tester, the combined tool, the subject of the suit here; is that correct?

A. Yes, sir.

Q. How many uses of the combined tool has the Texas company had since its first use for hire of the tool?

A. I don't know that.

Q. Would it be a number like or similar to the number [1025] here which you have reported?

A. No, sir, it would not; very low.

(Testimony of M. O. Johnston)

Q. A lesser number?

A. Yes, sir.

Q. One of the objects of the Lane patent is stated to be: to provide a formation tester which fires a projectile or several projectiles through the well casing and thereafter receives the sample through the perforation so made. That was one of your objects in providing the combined tool, the subject of this law suit?

A. Yes, sir.

Q. And that object was accomplished by the combined tool?

A. Yes sir.

Q. Another provision of the Lane patent is stated to be: to provide a gun-type formation tester which may be run in on standard tubing or the like and utilizes other conventional well equipment for its operation. That was one of your objects in providing the combined tool of your company?

A. That was the object of providing the gun.

Q. And that object was accomplished by the combined tool?

A. Yes, sir.

Q. Another object of the Lane patent was: to provide [1026] a formation tester of this class in which the damage to the well casing consists merely in one or more relatively small round perforations that may be readily cemented up if improperly located or otherwise undesirable, thereby providing a formation tester which does not interfere with subsequent drilling or other operations in the well bore. That also was a purpose of your provision, the plaintiff's provision of this combined tool?

A. Yes, sir.

Q. And that purpose was accomplished by them?

A. Yes, sir.

(Testimony of M. O. Johnston)

Q. The object of the Spencer patent is stated to be: to provide a formation testing apparatus wherein a gun mechanism is incorporated with a tester valve structure and a packer and is adapted to be lowered therewith as a unit. That was an object which was accomplished by your provision of plaintiff's combined tool?

A. Yes, sir, that's correct.

Q. Another object of the Spencer patent was: to provide a projectile firing formation tester wherein the formation tester valve may be controlled from the surface independently of the operation of the gun. That was the object of the plaintiff and an accomplished object in providing its combined tester and gun perforator?

A. Yes, sir. [1027]

Q. An another object of the Spencer patent was: to provide a projectile firing formation tester whereby a thorough investigation of the zone perforated including production tests may be made, the tester permitting washing of the formation through the perforations made by the gun, such as by operation of a swab in the tubing string or circulation of fluid all without removing the formation tester. That was an object of the plaintiff in providing its combined tool, and that object was accomplished by the tool, was it not?

A. I don't understand that "washing." I can't answer that.

Q. Is it possible with the combined tool of the plaintiff to wash after perforating?

A. Not my tool. It would not be practical.

Q. Is it possible with your tool to wash, if the combined tool becomes stuck in the well?

A. Yes, we can back-pressure.

(Testimony of M. O. Johnston)

Q. Then with that understanding of the term "washing" in my question, this object, stated object of the Spencer patent, was an object of the plaintiff's in providing its tool, and it was accomplished, wasn't it? That is true, isn't it?

A. Well, I suppose it could be under certain circumstances, but it wasn't designed for that purpose. [1028]

Q. Is it your opinion, Mr. Johnston, that it is safe to gun perforate beneath a set packer?

A. Not if the valve is closed, not under your drill pipe or tubing, it is not safe; no, sir.

Q. If the valve is open, it is a perfectly practical and safe operation to gun perforate beneath the set packer, and a prudent operator would do it; is that correct?

A. If the valve is open and not choked, if it has a wide opening.

Q. Your answer would be—

A. I think you could do it.

The Court: That is the tester valve?

The Witness: Yes, sir.

Q. By Mr. Foster: Now, suppose that the tester valve is closed and the packer is set, what is the basis for your answer that it would be unsafe to gun perforate beneath the set packer? Have you made any tests or experiments?

A. I haven't made any tests, no, sir; but I could visualize if you squeezed your fluid under your packer and built up a pressure, instant of pressure under that, that something would have to give; either your casing would have to burst or your packer give or blow it up in the hole; something would have to give if you add a blast to that. Now, that is only visual. [1029]

(Testimony of M. O. Johnston)

Q. You have no reports of investigations by others or you have no investigations by yourself to confirm that circumstance you envision?

A. I have heard that those tests have been made, Mr. Foster, but it is only hearsay.

Q. They were not reports made by employees or any one retained by your company to your company?

A. No, sir.

Q. With the combined tool, subject of the suit here, the plaintiff's tool, on occasion it has been used to perforate in oil as contrasted with fresh water mud, has it not?

A. You mean oil in the casing?

Q. Yes. A. Yes, sir; it has.

Q. And what was the reason that oil was used to replace the mud during the perforating?

A. Well, I don't know what the occasion would be. It was probably a low head sand.

Q. By "low head" you mean low pressure sand?

A. Low pressure sand; yes, sir.

Q. You have encountered in your practice the perforating of low pressure sands at considerable depths, have you not?

A. Oh, I think so, yes, sir; a lot of depleted sands [1030] in the field.

Q. And those pressures might be as low as 50 or 100 pounds?

A. Oh, I suppose they could be; yes, sir.

Q. And at depths in excess of 5,000 feet?

A. I think so.

(Testimony of M. O. Johnston)

Q. Why is it that they use oil in these low pressure sands when they perforate?

A. Well, they would prefer that the oil would go back rather than the water.

Q. Because of damage of the water to the low pressure sands?

A. Well, it would be easier to bring the well in if it was oil instead of water; it would come in more readily.

Q. Is that because if you used a water mud in those low pressure sands, the water would pass out of the mud and invade the low pressure sands and diminish the productivity of the low pressure sands?

A. I don't know about diminishing it. Water always comes out, as a usual thing comes out, anyway, in my experience.

Q. I do not understand, Mr. Johnston, your former answer. I got that the water always comes out, anyway, from the low pressure sand. Why does the operator bother to [1031] substitute oil for the fresh water mud before he perforates into that sand?

A. I said it would come out more slowly. For instance, if you are testing in a sand and your water goes back, you have to accumulate that water in your tester, and probably put or could put the same amount in your drill pipe as the pressure within the sand.

Q. And diminish your oil sample to that extent; is that a fact?

A. Well, it could; yes, sir.

Q. And another reason, I suppose, would be for a prudent operator to substitute oil for fresh water mud in

(Testimony of M. O. Johnston)

perforating into a low pressure sand is to avoid the impendence of the mud cake?

A. Yes, sir. Usually, under those low pressure sands, they know what they are doing when they are going into them; so therefore they prepare for it.

Q. Wouldn't you say it was common practice in low pressure sands to substitute oil for the fresh water mud for the reasons you have given before perforating and testing?

A. Well, I think, if I was an operator and going to do some work on a low pressure sand, I would do it. I wouldn't say it is common practice. Sometimes it is whether the oil is handy or not, or getting the oil when [1032] it would cost more to get the oil and put it in there, or cost more to draw the water out. That would depend on circumstances, I believe.

Q. You have said that the water that comes out may come out slowly after it has invaded the low pressure sands. You have observed, haven't you, Mr. Johnston, wells with low pressure sands where the invaded water did not come out for days?

A. No, sir. Mr. Foster, I can give you an example in this Dominguez field, and it is the only one that I know of—I think it is between 4,000 and 5,000—that I personally ran the tester myself. Now, the operator knew that it was a low pressure area, and we made an accumulation of—oh, I don't remember the exact number of feet within the drill pipe, but it had ceased coming in; so we drew the tester quickly, as quick as we could, and put it back in and tested, and this time, why, the water came in and then the oil, but the water was filtrate water. They knew that. They tested it to see the salt

(Testimony of M. O. Johnston)

content, so on and so forth, so they knew what they were doing. I think I made two of such tests. That is the most water I ever drew out of a sand. I have had occasions to test new sands that would not get any filtrate water at all. Now, why, I don't know. We would get our rat hole mud and then our oil. So some things in those wells we just [1033] can't explain, that is all.

Q. Now, you spoke of measuring the salinity of that water that was secured in the test. It is not uncommon at all, after the test is taken, to determine the salinity of the water in the sample, is it?

A. Well, no. Sometimes they have to what they call titrate that water to get the salt content of it. In fact, we used to, when I first started making casing tests, the men themselves carried a titration set with them.

Q. That is your men? A. Yes, sir.

Q. And the purpose of determining the salinity of the sample of water secured in the test is to determine the zone or source from which that water came in the well, isn't it?

A. Well, I suppose the operators do that. Now, this was on—we were on casing tests alone during that. We know what the salt content of our mud is and, as it picks up, if we get a rise of the fluid, why, they take samples at different places and at the bottom of the sample or somewhere near the bottom, the same as the mud, so they consider that must be water somewhere, accumulation back of the pipe.

Q. Now, it is not uncommon to make a salinity test or to use a salinity test to determine the source from

(Testimony of M. O. Johnston)

which [1034] or the zone from which the water came down in the well; that is true, isn't it?

A. I don't understand just what—

Q. I don't mean to confuse you.

A. No, I know.

Q. My question is not clear, probably. It is my understanding that the salinity of the water in different levels of the formations down in the well differ usually, so that if we can accurately determine the salinity of the water in the sample, we get some indication of which zone or sand, which level of the sand it came from; that is true, isn't it?

A. I think that would be correct.

Q. So that you would agree, then, that, to the extent that fresh water from the mud invades the formation after perforating and before testing and returns with the sample of oil and water from the formation into the tester, you have masked and made difficult of determination the source of the water from the formation? You would agree to that, wouldn't you?

A. We would know whether it was water that had filtrated back or whether it was salt water. However, at times the oil sands do have a salt water in them and you don't always know just what the salt water content is. So if your filtrate water goes back in this salt water that [1035] is already in there, it will mix with it and it may be hard to determine whether that is wash water or water that has some salt water. Usually, in a proven field they know what sands, what the salt content happens to be in those sands; but in a wildcat field they would not know that.

(Testimony of M. O. Johnston)

Q. In a proven field where they know the salt content of the different layers of sand has different values, you agree that, to the extent the fresh water in the mud invades the formation and returns into the tester, where the salt water is from the formation in the oil, you have masked or made difficult of determination that source of the salt water, which layer or bed it came from?

A. In the proven fields?

Q. Yes. That is true, isn't it?

A. If it is not too badly—well, I suppose the answer would be yes on that.

Q. And don't you agree that, with the use of the separate gun perforator and tester, we have, by virtue of a longer time of contact of mud with the perforated formation, we have a greater invasion of the fresh water into the perforated formation than is had when we use the plaintiff's combined tool?

A. Well, that is a matter of time. I think it is a well known fact that water will filtrate back in sand.

Q. You agree with my statement? [1036]

A. Well, yes; it will build back in.

Q. You have spoken of the practice of substituting for the fresh water mud opposite a low pressure formation oil before perforating. How long has that been done to your knowledge?

A. Oh, that has probably been done 30 years or more. I couldn't remember.

Q. As long ago as 30 years that was done to avoid the ill effect of mud cake formation and fresh water

(Testimony of M. O. Johnston)

invasion to which you refer? It had the same purpose then that it has now?

A. Oh, it had the same purpose then as it has now; yes, sir.

Q. With the use of your combined tool have you ever known of it to be operated in this manner: That is, washing with oil the perforated formation after perforating and before taking a sample?

The Witness: Read that question again, please.

Mr. Foster: It may not be clear.

(Question read by the reporter.)

A. I don't know whether we have or not.

Q. You do recall that in your use or your observation of the use of the separate perforator, whether gun or chemical, and separate formation tester there have been operations in which the perforated formations are washed [1037] with oil before testing?

A. I can't recall, offhand, but I suppose it has been done.

Q. Have you observed the perforated formation washed with water before testing, salt water?

A. Well, I don't know that, either. We have washed wells when we were going to bring them in with fresh water. That is the only way we had to bring them in in the old days.

Q. In your observation of the separate tester, uncombined with the gun perforator, have you observed any steps to eliminate or reduce the impedance to the inflow of fluids by virtue of the mud cake before taking the tests?

A. I can't say that I have; no, sir.

(Testimony of M. O. Johnston)

Q. You have observed with the use of a separate tester and with the use of your combined tool a manually controlled bean at the surface to control the inflow of fluids into the tool, haven't you?

A. I certainly have not.

Q. You have stated that the combined tool has an advantage over the separate gun perforator and tester in the saving of time; and you have said that, with the passage of a longer time, there is a greater damaging infiltration of fresh water into the formation. Do you [1038] agree that with the use of the combined tool you have the advantage over the separate tool of a better sample by virtue of less fresh water invasion into the formation?

A. We never have given it much thought, but listening to Mr. Law's testimony up here, why, evidently it goes back and there must be some more. Our tests with the gun separately and with the gun being run on the line have been as successful as the ones that we have run the gun and the testing tool together. I haven't noticed any difference.

Q. Have you run the separate tools and the combined tool under the same circumstances, taking a sample in the same well, at the same zone, with the same pressures, with the same mud columns and so on?

A. Well, I would have to look that up, but I suppose so, with the amount of tests that we run, that we certainly have under the same circumstances. [1039]

* * * * *

(Testimony of M. O. Johnston)

By Mr. Foster:

Q. Mr. Johnston, the Texas company, the Johnston Oil Fields Service Corporation, is operating under this license, Plaintiffs' Exhibit 7, under the Collins patents, as well as your California company; is that true?

A. Yes, sir.

Q. As a matter of fact, each of those two companies is licensed under all of the patents and applications of the other company in this field of testing and perforating; that is true, isn't it?

A. Yes, sir.

Q. Is the Texas company contributing to the expense of this litigation here?

A. I haven't given that any thought.

Q. Your answer is that they may be?

A. That will be up to me whether they do or not. I own both of them. [1040]

Q. In other words, you control both companies?

A. Yes, sir.

Q. And if you elect to have them pay part of the costs, they will do so, that is, the Texas company?

A. Yes, if I do.

Q. Is there any person, firm or corporation, other than the plaintiff here and possibly the Texas company, contributing to the expense of this litigation?

A. No.

Q. When you employ a gun perforator separately, that is, without a tester in combination with it, Mr. Johnston, as you draw the perforator out of the well I understand that it exerts somewhat of a swabbing or lifting action upon the fluid in the casing; is that correct?

A. Well, that would depend on what size gun you are running in this casing. If you don't have much

(Testimony of M. O. Johnston)

clearance between the casing and the gun, why, there would be quite a bit of friction to pull it out.

Q. With some of the guns of some of the dimensions which you have operated, as you withdraw the gun from the casing after perforating, there would be some swabbing action, wouldn't there?

A. I haven't operated any guns with the line, a line gun. [1041]

Q. Do you agree that if a gun perforator were operated on a line, it would, as it was drawn from the well, exert somewhat of a swabbing action upon the fluid in the casing?

A. In the instance I have stated, if it fit real close, why, it would probably have some friction. I don't know about the swabbing action. You would slow it up until it would by-pass, draw it slowly out, and it would not have any swabbing action.

Q. If you drew it out with normal speed that a gun perforator would be drawn out on a line, then wouldn't you expect there to be some lifting and swabbing action with regard to the fluids in the casing?

A. I don't think you would have gotten the gun down to start with if it would do that. You would not have enough clearance.

* * * * *

Q. It is a fact, isn't it, Mr. Johnston, that in [1042] your many years of operating the tester alone, you many times encountered difficulty in lowering the tester to the

(Testimony of M. O. Johnston)

level where you wanted to take the sample because of the sanding up of the well?

A. Well, not altogether a sanding up, Mr. Foster. Sometimes we suppose that sand bridges, other times it is mud balls and perhaps mud cake that formed on your sands, that has grown up. They haven't reamed through it, or a great many times we have to withdraw the tester. Now, this is in an uncased hole I am speaking of now, that you can't always get to the bottom. It has probably been considerable time since they have drilled through, reamed back through the hole.

Q. You have had that same trouble to some extent, using the tester in cased holes, haven't you, after perforating?

A. Well, we did in the early days, Mr. Foster, but not any more so much. It is usually now the fault of not getting the cement off the walls of the pipe, or not drilling the float collar out. But when I first started running water shutoff tests, why, we did encounter mud balls in the hole for some reason or other, but we don't now.

Q. You do not mean to say that never, with the tester inserted in casing after gun perforating, never have you met an obstacle in the hole such as a sand bridge that [1043] prevented you lowering the tester? You don't mean that, do you?

A. Yes; I mean that. If your pipe has not been perforated up above, you are going through; there is no reason for a sand bridge being in there at all.

Q. I am assuming that the casing has been perforated. Haven't you encountered some difficulty on some occa-

(Testimony of M. O. Johnston)

sions in lowering a tester because of the sanding up of the well?

A. We are now testing below perforations?

Q. Yes, Mr. Johnston.

A. Oh, I suppose there has been occasion in the past. I don't know that it has. If it has, why, it certainly should put mud back in it and we would run through it in length of time. We have stuck drill pipe.

Q. Have you ever had any experience with separate tester in which your tester became stuck in the well and you encountered difficulty in removing it?

A. Yes, sir.

Q. Have you had any similar difficulty running gun perforators?

A. We probably have, one or two occasions. I don't know. I can't recall offhand.

Q. Pardon me. Had you finished, Mr. Johnston?

A. Really, I can't recall offhand. We probably have. [1044]

Q. On these occasions that you know of, when the tester became stuck in the hole, what operations were involved? Did it require a fishing job?

A. Well, we usually run a left-hand joint above our equipment or any equipment that is run in the well, we call a safety joint, that, if something does foul it up, that we can back off. Then they go in with the proper fishing tools and a set of jars and jar it out, or try to jar it out, which they usually do.

Q. Sometimes they are not able to get that out at all, are they, that tester?

A. Out of the casing?

(Testimony of M. O. Johnston)

Q. Yes.

A. I don't know of any instance they may have left them in there, but parts of it, they mill it out.

Q. You have known of some instances in open formation where they could not get the tester out, haven't you?

A. Yes, sir.

Q. And if they are successful in that fishing job, with the proper tools and jars, it is a time-consuming and expensive operation, is it not?

A. Well, sometimes it is. It is some time involved; yes.

Q. Do those fishing jobs or tools becoming stuck in the well so that they can't be removed, does that [1045] endanger the well? Does that make a risk of loss of the well?

A. I haven't known of them losing any wells on that account. They sidetrack it or fish it out. They usually fish it out.

Q. But whether they do a fishing job successfully or mill it out or sidetrack in drilling, that requires considerable time during which the well cannot, of course, produce; that is true, isn't it?

A. Well, they can't complete the well until they clean it up.

Q. Yes. And those operations, both of them or any of them, require considerable time?

A. Yes, some time is involved, maybe one trip, maybe a dozen trips.

Q. Or 50 trips?

A. That is right.

Q. Now, isn't it a fact that using the combined tool instead of the separate gun perforator and tester, there

(Testimony of M. O. Johnston)

is greater safety as regards the tools becoming stuck in the well and as regards the necessity for fishing, milling or sidetracking operations in the well?

A. No; I wouldn't say that. [1046]

Q. Wouldn't you say that if you run a gun perforator separately and there is a danger of its becoming stuck in the well, and you run a tester separately and there is a danger of it becoming stuck in the well, that the danger is reduced to run them both as a combination upon the same tubing or drill pipe?

A. Not for argument, Mr. Foster, but there is some danger in running the gun with the tester over and above just running the tester alone, because you have that much more on the bottom of it to sand up, and when you shoot your well and you set your packer and it heaves in, then you have a stuck job. If you are running a gun, and you shoot and pull it out, well, they lose guns too.

Q. But over all isn't there less danger, less of those dangers I have named, when we use the combined tool than when we use the separate gun perforator and tester?

A. There are two operations and I suppose probably in some cases, being two operations, there may be. I don't know. I had never thought about it that way.

Q. Thinking about it now, don't you agree with me there is lesser danger in the combined tool?

A. Well, in thinking about the gun on the bottom of the tester, and things that could happen to the gun with the tester, I will say it would be just about equal.

Q. Well, certainly, if the gun perforator is run in on [1047] cable separately, and then the tester is run in separately, there would be greater—the dangers I have

(Testimony of M. O. Johnston)

named would be greater than in using the combined tool run in on tubing or drill pipe; that is true, isn't it?

A. Well, separately using your gun, it can sand up, I suppose, and it can also sand up with it on the tester. You have that much more added to it.

Q. So that your answer to my question is "Yes," the danger is greater, or these dangers, with the separate tools than combined?

A. I would say about equal.

Q. About equal when the perforator is run in on the cable separately?

A. Yes, that is correct, because we have added the gun on the bottom of the tester, which is that much more to the tester, and then if the sand heaves up, when we relieve that pressure, we have that gun to stick where we don't have it if we had run the tester separately. Now, if you run the gun on a line, you have your mud fluid down there, and you shoot, and there isn't action or shouldn't be coming out, so that I will say the danger of running the line gun, just thinking about it at this time, would probably be equal. I don't know.

Q. You have never and your plaintiff company has never performed the operation of using for hire a gun perforator [1048] run in and out of the well on a line, have you?

A. No, sir, we don't hire the gun. The companies hire the gun.

Q. But the plaintiff company does do perforating, operate a perforator, a gun perforator, separately from a tester, doesn't it?

A. Well, we have run this gun that we have on drill pipe or tubing separate from the tester, yes, sir.

(Testimony of M. O. Johnston)

Q. But never on cable, Mr. Johnston?

A. Never on cable, no, sir.

Q. So that your estimate of the dangers involved in running a gun perforator on cable is not based upon any experience of your own?

A. No, sir, I was just thinking about it here.

Q. Is it not true that always in California when you use your combined gun there is used with it a pressure recorder on the bottom, which is illustrated in this large drawing, Plaintiff's Exhibit 14?

A. We usually run two pressure recorders, yes, sir.

Q. But you never run without at least one pressure recorder on the combined tool?

A. That is correct.

Q. Now, that pressure recorder, as I understand it, makes a running record of the pressure as the combined tool is lowered down into the well, and while it is in the well, [1049] and coming out of the well, doesn't it?

A. I didn't understand a word in there. I didn't hear it.

Mr. Foster: I am sorry. Will you read the question, please?

(The question was read.)

The Witness: Yes, sir, it records all the way down.

Q. By Mr. Foster: The pressure recorder or pressure bomb doesn't affect in any way the quality or quantity or nature of the sample taken by the tester, does it?

A. No, sir, it does not.

Q. And, conversely, the tester does not affect the readings or recordings of the pressure recorder or bomb, does it?

A. No; no, it doesn't.

(Testimony of M. O. Johnston)

Q. In other words, the tester and recorder each just do their ordinary function, unmodified or affected by the presence of the other?

A. Yes, sir, they do the separate jobs.

Mr. Foster: May I have marked for identification as Defendant's Exhibit—

The Clerk: Q.

Mr. Foster: —Q, the printed copy of the U. S. Patent to T. V. Moore, No. 2,189,919, issued February 13, 1940, for a method and apparatus for formation pressure testing. [1050]

Q. By Mr. Foster: I direct your attention, Mr. Johnston, to Fig. 1 of the patent, Defendant's Exhibit Q, for identification. Does that illustrate in a general way the pressure recorder or pressure bomb to which you have been referring? A. Yes, sir.

Q. And the plaintiff company is licensed under and pays a royalty under that patent, Exhibit Q for identification, doesn't it? A. Yes, sir.

Mr. Foster: May I have marked for identification as Defendant's Exhibit R a printed copy of U. S. Patent No. 2,161,233, issued June 6, 1939, on the application of Frank E. O'Neill, entitled "Well Testing Device"?

The Clerk: Defendant's Exhibit R, for identification.

Q. By Mr. Foster: I direct your attention to the drawings of Exhibit R, for identification, and ask you if that illustrates in exterior appearance a pressure bomb of the character or type which you use upon your combined tool, Mr. Johnston. A. Yes, sir.

(Testimony of M. O. Johnston)

Q. And you know that the Frank E. O'Neill who was the applicant for this patent is the Mr. O'Neill who testified as a witness for the plaintiff in this case?

A. Yes, sir. [1051]

Q. I note on the patent face it states that it is assigned to Mordica—

A. That is correct.

Q. —O. Johnston?

A. Yes, sir.

Q. Is that you, Mr. Johnston?

A. Yes, sir.

Q. And you are still the owner of this patent?

A. Yes, sir.

Q. From the fact that you are paying royalty under the Moore patent, Exhibit Q, for identification, I presume that you regard it as valid, Mr. Johnston?

Mr. Mellin: Your Honor please, I don't see where it is material here whether the Moore patent is valid or invalid. It hasn't anything to do with the validity of the patent in suit or the question of its infringement. Because that patent is owned by the Standard Oil Company and the Shell Oil Company and this man pays royalty can be no indication whether it is valid or invalid, and it hasn't any bearing on this suit.

The Court: How would it be competent, Mr. Foster?

Mr. Foster: I think for this reason, your Honor. I have in mind the questions that the court asked Mr. Leonard Lyon in the Shick Razor Company case about the separate function of the various elements. The witness testified that [1052] the pressure recorder does not affect the operation of the tester, that each performs its own function. May I just read claim 19 of the

(Testimony of M. O. Johnston)

Q. Now, if you know, Mr. Johnston, what percentage of tests made in the Midcontinent area—that includes Texas and the Midcontinent—are made in open hole as against those made in casing?

A. 90 per cent of them are made in open hole; 10 per cent of them would be in casing.

Q. And that is for the reason that the law there does not require water shutoff tests?

A. That is correct. [1071]

* * * * *

Mr. Foster: I now wish to offer portions of the testimony of Rodney S. Durkee, portions of which have already been offered by the plaintiff. The first portion—

The Court: That deposition is marked as Exhibit 30, for identification?

Mr. Foster: Yes, your Honor. The first portion is on [1252] page 25, commencing at line 13:

“Q. Do you recall a conversation, or a number of conversations, with Mr. M. O. Johnston, who is present here, relative to the Lane-Wells Company granting Johnston a license under the gun perforator patents which you have?

“A. I recall one or two conversations.

“Q. I wonder if you would relate, in substance, what was said in those conversations, if you can recall?

“A. I am not certain whether the first conversation was in person or over the telephone, but my recollection is that Mr. Johnston pointed out the

(Deposition of Rodney S. Durkee)

desirability of combatting apparent inroads of a competitor in the formation testing service, and suggested that our two companies ought to get together on a service of that kind.

"Q. Do you recall when that was?

"A. My recollection is that it was in 1941.

"Q. Go ahead. I didn't mean to interrupt you.

"A. I believe I told him at that time that I would look into the matter, and that subsequently I wrote him a letter, in which I offered him a license under our patents."

Then on page 29—the part I have read was testimony during the direct examination of Mr. Durkee by Mr. Mellin. The parts I will commence now to read are on cross examination.

* * * * *

Mr. Foster: (Reading)

"Q. Mr. Durkee, I show you a carbon copy of a letter dated May 5, 1941, to Mr. M. O. Johnston, the original purporting to be signed by Rodney S. Durkee, and ask you if that is one of the letters to which you referred in your direct examination?

"A. I am confused as to whether I referred to this particular letter or not. I referred to the letter in which I made the 66- $\frac{2}{3}$ per cent offer, but I don't believe I referred to this letter.

"Q. If you will read further down, I think you will find— [1254]

"A. I am sorry. I amend my answer to say that this is the letter I referred to.

(Testimony of M. O. Johnston)

think it is absolutely immaterial because whether we would have the right to show there is common co-operation between the tester bomb and a tester that isn't present between the gun and the tester, they function separately and they act differently, and we get into that trial instead of this.

The Court: That probably would be a matter of argument before this case is over, but I don't think it is a matter of testimony. Objection sustained. [1055]

Mr. Foster: Might I ask plaintiff's counsel, then, his position with respect to the validity of the two patents, and particularly the claims which I have read?

Mr. Mellin: If your Honor please, I never saw the patents in my life.

The Court: Perhaps Mr. Mellin will study them before the end of this case and state his opinion. [1056]

* * * * *

Q. By Mr. Foster: Mr. Johnston, do you have any knowledge from observation, experiments, investigations or reports to you or your company with regard to the depth of penetration of projectiles which are fired by the gun perforators into the formation, that is, the plaintiff's gun perforator?

A. No, sir; I don't, only through tests of cement. All we have been concerned with mostly is getting through our pipe and two strings of pipe and go out in the cement. I have never made any measurements to that effect.

Q. Have you made any determinations or any been reported to you by your employees as to the depth of

(Testimony of M. O. Johnston)

penetration into the hardened cement beyond the casing in [1059] such demonstrations?

A. Oh, I have seen cuts and photographs in oil periodicals and I don't—and I have witnessed those that have gone into the cement.

Q. What is the greatest distance you have witnessed of penetration into the cement beyond the casing?

A. The cement has been between the casing, just going out into the formation. We have a test well out there that we test them in, but I don't know how far it goes back in there.

Q. Have you observed any operations or tests, or have you had reports made to you by those in your employ or retained by you which indicate to you whether or not when your gun perforator shoots a projectile out into the formation, fracturing or fissuring of the formation occurs adjacent to the path of the projectile?

A. No; I haven't. I don't know how they would know.

Q. So there have been no surface tests that indicate either way to you whether or not such fracture occurs in the formation as the result of gun perforation?

A. No, sir; we haven't made those tests ourselves.

Q. Have you any observations or reports made to you which indicate to you that by gun perforation a well has been caused to produce more than it did before gun perforation from the same zone? [1060]

The Witness: I would like that question again, please.

Mr. Foster: Surely. May the court reporter read it, your Honor?

The Court: He may.

(Testimony of M. O. Johnston)

(Question read by the reporter.)

A. I don't know whether I have had or not, but I would imagine, if they have shot an old liner that has been plugged up, either shot it or perforated it with a mechanical perforator, that would certainly give up more than it was giving up before they did do it. I don't know as I have had it reported to me, but that would be only reasonable to expect.

Q. Have you made any observations or had any reports made to you that would indicate that the disturbance caused by gun perforating in the formation causes it to produce more than it otherwise would?

A. No, sir; I haven't.

Q. Nor have you had any observations or reports indicating contrary-wise?

A. No, nor contrary. In our tests we do not always know what we are shooting into. That is up to the operator, and some of the information is their own. They don't give it to us. They want to shoot so many holes, we go out and shoot it and test it. We don't know what we are testing for.

Q. Then you agree with the statement contained in my [1061] last question?

A. I will agree with that.

Q. When you have operated the separate tester and not secured a sample, is that a reliable indication that you would not have secured a sample with the combined tool?

A. I don't understand that question.

Q. Let me reframe it. When you have operated after perforating to secure a sample with a tester as a separate tool, and you have secured no sample in the

(Testimony of M. O. Johnston)

tester, is that a reliable indication that you would not have secured a sample from the same zone had you used, instead of the separate tools, the combined gun perforator and tester?

A. Do you mind if I put it the way I think? They have used the gun separately, and then we had used the tester separately, and we didn't get a test in that manner, an then we ran them together and we still didn't get a test?

Q. No; that is not my question. My question presupposes this operation, Mr. Johnston: That you had run or someone had run a gun perforator separately from the tester, and then in the performance of your separate testing service you had run a tester into the well separately from the gun perforator to secure a sample, and you secured no sample; now, is that a reliable indication that if, instead of running the separate tools, [1062] you had run the combined tool, you would not have gotten a sample?

A. No; it is not a reliable indication. However, with our pressure bombs on there, Mr. Foster, we would have known whether the bullets had penetrated the formation—I mean the casing, or whether it had not penetrated, or whether the tool had stopped up in the bean, or whether the perforations had stopped up?

* * * * *

Q. Never before the applications for the patents in suit, the Lane and Spencer patents, did you ever see, hear of, or know of any use, invention by others, or any disclosure in a printed publication or a patent of a combined gun perforator, packer and formation tester in a

(Testimony of M. O. Johnston)

unitary tool that could be run into and withdrawn from a well as a unit; that is true, isn't it?

A. As a unit; only separately.

Q. With that qualification, you agree that that is true? [1063]

A. That is true up to the time of that patent.

Q. Of the patents in suit?

A. Of the patents in suit.

Mr. Foster: That is all.

* * * * *

Cross Examination

By Mr. Mellin: [1064]

* * * * *

Q. Now, with respect to the exhibit, Defendant's P, Mr. Johnston, there is listed on there the number of combined gun and tester runs for the years 1946 and 1947. Now, those would be all runs in well casing, would they not? A. Yes, sir.

Q. If you know, what percentage of those runs would be water shut-off tests and what percentage would be for what we call production tests of formation? [1066]

A. It would be about 90 per cent water shut-off tests.

Q. And the 10 per cent?

A. That would be production tests.

Q. At the same time you gave me those figures in response to Mr. Foster's request, you also gave me—

May I have this marked for identification?

The Witness: May I change that, Mr. Mellin?

Mr. Mellin: Why certainly, if it is not correct.

(Testimony of M. O. Johnston)

The Witness: I think in the combined gun and tester runs, that probably the production tests would not be any more than two per cent, in the gun and tester run together.

Q. So there would be approximately 98 per cent casing water shut-off tests and two per cent production tests? A. Yes, sir.

The Clerk: This document will be 34 for identification, Plaintiff's, "Record of casing and formation tests."

Q. By Mr. Mellin: I show you what is labeled "Record of casing and formation tests," which has two columns. The left one shows "total casing tests with and without gun." And that refers to the tests made in casing; isn't that correct? A. Yes, sir. [1067]

Q. And, for the year of 1946 there were 2,594 of those, and for the year 1947 there would be 2,823. Now, those include the total shown on Exhibit Defendant's P, isn't that correct? A. Yes, sir.

Q. Now, of the casing tests which you made into perforations, using the gun and tester separately, if you know, what percentage of those tests were water shut-off tests? A. 90 per cent of them.

Q. And 10 per cent would be production tests?

A. Yes, sir.

Q. Could you explain to us, please, why in the use of the combined gun and tester, why is that used less and for making production tests than is the gun and tester run separately, if you know?

A. Well, usually, in California our sand bodies are quite thick and in running the combined tool, gun and tester, why, we shoot four shots to the foot at the present

(Testimony of M. O. Johnston)

time and about, oh, 30 to 40 foot at a time would be as much as we could shoot, or safe to shoot; and so, shooting, say, 200 foot of sand, it would take entirely too much time. You could take a line gun and shoot 50-foot at a time quickly, and do that job much quicker. That is the reason we do not do very many production jobs with the combined tool. [1068]

Q. In water shut-off jobs you only have to shoot just the four holes; you do not have that same condition?

A. Yes; that is correct.

Q. And therefore, if you had a thick sand, say, 200 feet, as you have explained, the fact is that running a line gun and a tester separately would be more economical as far as time is concerned than running your combined tester and gun? A. Oh, yes; much more so.

Q. Now, I noticed in Exhibit 34—

Is it 34, Mr. Clerk?

The Clerk: 34 for identification.

Q. Yes; 34 for identification, there is a right-hand column "Formation tests in open formation without gun," the first for the year 1946, there is 1,483 of them against 2,594 tests made in casing; in 1947 there is 1,696 made in open formation, uncased holes, as against 2,873 made in casing. Now, Mr. Johnston, in those tests made in open holes, uncased, what sort of a packer do you use, if any?

Mr. Foster: Just a moment, your Honor. I object. I do not believe any foundation has been laid for this document as to its accuracy, and Mr. Mellin is quoting copiously from it into the record.

The Court: Your objection is good.

(Testimony of M. O. Johnston)

Q. By Mr. Mellin: Did you take these figures directly [1069] from your records, Mr. Johnston?

A. Yes, sir.

Q. And you know as a matter of fact, they are correct, of your own knowledge? A. Yes, sir.

The Court: Do you offer the document?

Mr. Mellin: I offer it into evidence, your Honor.

The Court: Is there objection?

Mr. Foster: No objection.

The Court: Plaintiff's Exhibit 34 for identification is received into evidence. Did you intend to offer Q and R for identification?

Mr. Foster: Yes, your Honor; I do.

* * * * *

The Court: Objection overruled. Defendant's Exhibits Q and R for identification are received into evidence.

Mr. Mellin: Would you read the last question, Mr. Reporter, please?

(Last previously unanswered question read by the reporter.)

A. We use rat hole packers and straight hole packers and combination packers.

Q. A combination packer is a combination rat hole and [1070] straight wall packer? A. Yes, sir.

Q. But you do run tests with a straight wall packer?

A. Yes.

Q. Is that a common procedure or an uncommon procedure?

A. It is a very common procedure. Most of our tests in the Midcontinent are straight hole tests.

(Testimony of M. O. Johnston)

Moore patent under which the plaintiff pays royalty. It is very short.

“In combination, a formation tester for a well bore including a packer adapted to seal off a formation from the remainder of the bore, and a pressure recorder below said packer adapted to be positioned adjacent said formation to record the pressure thereof when said packer is set.”

And may I read claim 2 of the O'Neill patent, which is even shorter:

“In combination with a packer having a fluid passageway there through and a valve structure to control the flow of fluid, an intermediate unit comprising a tubular housing connecting the packer and the valve structure and providing a fluid passageway there between, and a pressure recording device detachably mounted therein and around which fluid will flow from the packer to the valve structure.” [1053]

Incidentally, the O'Neill patent points out in its specifications that each of the elements here specified is old, that the packer is an old type, the valve structure is of any old structure, as well as the tubular housing is of any old housing, and the recording device is not even illustrated in any detail, it is any conventional recording device. Now, having in mind the witness' testimony with respect to the lack of co-operation between these elements and having in mind that the plaintiff pays the Moore patent a tribute of royalty, which is a tribute to its validity, and pays to the O'Neill patent the tribute of continuation or ownership, and having in mind that the

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plaintiff and plaintiff's counsel are contending that the Lane patent is invalid for aggregation, where we have shown the co-operation between the elements, and some co-operation and a saving of time and money is admitted, I think we are entitled to have in the record a statement by the witness that the plaintiff regards the patent valid or invalid. And, furthermore, if the plaintiff is not qualified to give that statement, I think the court is entitled to request such a statement of plaintiff's counsel, as an officer of the court.

The Court: It might be from plaintiff's counsel. It might be a question of law. But, as I understood you, Mr. Johnston's testimony is that the plaintiff is the exclusive licensee, or at least a licensee under the Moore [1054] patent.

Mr. Foster: Yes, sir; not an exclusive licensee.

The Court: Being a licensee, I assume that that is an acknowledgment in Plaintiff's view that that patent is valid, so long as the plaintiff operates under the license. I think the plaintiff would be estopped to assert to the contrary, so long as the plaintiff acts as a licensee, being estopped so far as the owners of the patent are concerned, but not so far as the parties to this suit are concerned.

Mr. Mellin: Your Honor, if I may be heard on that point. The witness did say that each had its separate function. If that is going to stand in the record, I will have to show by the witness that that actually is not the case, that they don't have the separate function. and then we get into trying the Moore patent and not the Lane patent in suit. So I say it is immaterial. We have let it in that he is a licensee, for what it is worth, but I

(Deposition of Rodney S. Durkee)

"Q. Is it your recollection that the original of that letter was sent some time, on or about the date it bears, to M. O. Johnston?

"A. Yes.

"Q. And until the copy which you have in your hand was delivered into my custody a short while ago, where was that copy retained, do you know?

"A. In the files of the Lane-Wells Company.

"Mr. Foster: I will ask that the carbon copy of the letter dated May 5, 1941, be marked by the reporter as Defendant's Exhibit B-1 for identification."

I now offer the copy of the letter in evidence, your Honor, as the Defendant's next exhibit.

The Court: It has heretofore been marked as Exhibit 30-B-1 for identification.

Mr. Foster: May it be marked with the same number in evidence, your Honor?

The Court: Is there objection? [1255]

* * * * *

The Court: The objection is overruled. The letter will be received in evidence and marked as Defendant's Exhibit 30-B-1 in evidence.

Mr. Foster: I don't know whether your Honor has read the letter or not. Did your Honor read it? [1256]

The Court: Yes. There is a carbon copy attached here to the deposition. I read it before ruling on its admissibility.

(Deposition of Rodney S. Durkee)

Mr. Foster: I will continue to read from page 30, line 26, your Honor:

“Q. I show you a carbon copy of a letter, dated May 13, 1941, addressed to Mr. M. O. Johnston, the original of which is purported to be signed by you, and ask you if the original of that letter, to the best of your recollection, was mailed to Mr. Johnston on or about that date?”

“A. Yes.

“Q. And has that carbon copy also been retained in the files of the Lane-Wells Company since the date of that letter, until it was delivered into my custody a short while ago?”

“A. Yes, sir.”

I now offer in evidence as Defendant's Exhibit 30-B-2 the letter referred to by the witness.

* * * * *

The Court: The objection is overruled. The letter is received in evidence and will be marked Defendant's Exhibit [1257] 30-B-2 in evidence.

Mr. Foster: I don't wish to impose upon the court, but I propose to read from page 31 to 36 and offer the other letters which are attached as Exhibits to the end of the deposition. I am glad to continue or to refrain from doing so, as the court's pleasure may dictate.

The Court: You might proceed and read it into the record. Then it will appear in the record at this juncture.

(Deposition of Rodney S. Durkee)

Mr. Foster: Thank you. Beginning at page 31, line 17:

"Q. I show you two pages of typed carbon copy on the letterhead of Johnston Oil Field Service Corporation, dated August 14, 1941, addressed to Mr. M. O. Johnston, and purporting to be signed by H. L. Dear, and H. F. Atkins. Did you ever see that document before?

"A. I did.

"Q. When, to the best of your recollection, with respect to the date, Mr. Durkee?

"A. I saw it some time in the fall of 1941, after the date of the letter.

"Q. Where did you secure the copy?

"A. It was handed to me by Mr. M. E. Montrose, who at that time was general sales manager of our company.

"Q. And that was pursuant to the pending [1258] negotiations for the grant of a license by the Lane-Wells Company to Mr. Johnston, was it?

"A. Yes, sir."

I ask that a copy of the letter identified by the witness be received as Defendant's Exhibit 30-B-3.

The Court: Is there objection?

Mr. Mellin: The same objection as to immateriality, your Honor.

The Court: Who are H. L. Dear and H. F. Atkins?

Mr. Foster: I think Mr. Mellin can answer that. They were representatives in the Mid-Continent of M. O. Johnston Company.

The Court: Does that appear in the deposition?

Mr. Foster: I think it appears. If it does not, I believe I was told that at the time this deposition was taken by Mr. Mellin and Mr. Johnston.

The Court: Do you offer a stipulation on that subject, Mr. Mellin?

Mr. Mellin: I think that is so.

The Court: They are representatives of the plaintiff?

Mr. Mellin: They are representatives of the plaintiff in some capacity.

The Court: Very well. The objection is overruled. The letter will be received in evidence and marked Defendant's Exhibit 30-B-3, in evidence. [1259]

The Clerk: May I have the date, please, your Honor?

The Court: The letter, or it is a copy of a letter, is dated August 14, 1941. That is correct, is it not?

Mr. Foster: Yes, your Honor. May I continue?

The Court: You may.

Mr. Foster: I will read from page 32, line 15.

"Q. I show you a carbon copy of a letter dated October 23, 1941, addressed to Mr. M. O. Johnston, the original of which purports to have been signed by you, and ask you if it is your recollection that the original of that letter was sent to Mr. Johnston on or about that date?

"A. It is.

"Q. And has that carbon copy been retained in the files of the Lane-Wells Company since that date, until it was delivered to me a short time ago?

"A. Yes."

I now offer a copy of the letter identified by the witness in evidence as Defendant's Exhibit 30-B-4.

The Court: The same objection?

Mr. Mellin: Yes, your Honor.

The Court: The objection is overruled. The letter is received in evidence as Defendant's Exhibit 30-B-4.

Mr. Foster: Continuing from page 33, line 6: [1260]

"Q. I note that in Exhibit B-3 it is stated that the royalty on gun perforating would not exceed 15 per cent, and I note that in Exhibit B-4, in outlining the terms of a license to Mr. Johnston, in paragraph 9, it is stated: 'We will charge a royalty of 15% on that portion of your charge attributable to the gun perforating operation.' Was this offer, or any offer, based on a 15 percent royalty on the gun perforating charge, ever accepted by Mr. Johnston?"

Do you wish your objection read, Mr. Mellin?

Mr. Mellin: Please.

Mr. Foster: (Reading):

"Mr. Mellin: I object to that, on the ground that the letters speak for themselves, and we will stipulate that there was no license entered into."

There was no answer, so that that should appear in the record. (Continuing):

"Q. I show you a carbon copy of a letter dated November 21, 1941, addressed to Mr. H. F. Atkins, of Johnston Oil Field Service Corporation. Did you ever see that carbon copy or the original of which it is a copy before?"

"A. No; I did not see the original, but I have seen the carbon copy.

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“Q. Can you state approximately when, with [1261] respect to its date?

“A. I saw it some time after the letter was written, because I believe at that time I was out of town, at the date of writing the letter.

“Q. Would you say within a few weeks after its date?

“A. Yes, within a short time.

“Q. Do you know where that carbon copy has been since the time you first saw the letter?

“A. It was delivered to me a short while ago—in our files.”

I now offer the letter identified by the witness in evidence as Exhibit 30-B-5.

Mr. Mellin: The same objection.

The Court: The objection is overruled. The copy is received in evidence and will be marked as Defendant's Exhibit 30-B-5.

Mr. Foster: Continuing on page 34, line 15:

“Q. Mr. Durkee, do you recall how the figure of $66\frac{2}{3}$ percent of the charge attributable to the perforating was arrived at?

“A. Well, at the time the matter was first broached we were doing a small amount of perforating in the field, which presumably was perforating required by the oil companies prior to testing. [1262] Those were what we called four-hole jobs. We felt that, if Mr. Johnston secured a license and operated a perforator in connection with his tester, that we would lose all or a large part of that perforating busi-

(Deposition of Rodney S. Durkee)

ness, which, incidentally, is very profitable, because of the relatively high charge per hole on the small hole jobs, and we calculated at that time that our direct field costs of operating our perforator service on jobs of that size was not over one-third of the sales price, and consequently we initially asked the $66\frac{2}{3}$ percent royalty, which would return us the same money as we would have gotten if we performed the job ourselves.

“Q. I notice that in Exhibit B-5 it is stated: ‘We cannot offer you an exclusive license to operate a gun perforator in connection with a testing tool.’ Was the reason for that your feeling or your fear that you had already granted licenses under your gun perforator patent, so that you were not in a position to legally grant an exclusive license?

“A. That was one of the determining factors, and the other was that it had never been our policy to grant exclusive licenses.”

Continuing at the top of page 36:

“Q. Referring to the letter of October 23, [1263] 1941, of which Mr. Foster read a portion referring to a royalty of 15 percent on ‘that portion of your charge attributable to the gun perforating operation,’ that 15 per cent was due to the requirement stated in paragraph 4 of that letter, ‘We will require you to purchase all guns and major parts thereof from us at actual cost of labor and materials plus our regular shop overhead currently charged at the time of manufacture plus 25% of the total of labor, material and overhead. You will be permitted to make minor re-

(Deposition of Rodney S. Durkee)

pairs necessary in the field without payment to us,' so that actually the royalty was not the only consideration, the 15% royalty was not the only consideration to be received by Lane-Wells?

"A. That is right."

If it will be of any assistance to court and counsel, I will be happy to state that, as we are at present advised, if no foundation need be laid for the introduction of the two letters which I have handed to Mr. Mellin—

Mr. Mellin: These letters, your Honor, are dated November 24, 1947.

Mr. Foster: That is correct.

Mr. Mellin: In other words, after this trial was started, and they are from one officer of the defendant to another. They are self-serving, and certainly they are after the suit [1264] was started.

Mr. Foster: They have not been offered yet.

Mr. Mellin: No, but he wants me to stipulate that they can be offered. I can't so stipulate.

Mr. Foster: Are you going to stipulate that the inquiry was made—

Mr. Mellin: I will stipulate the letters were written, but I will not stipulate that they may be offered in evidence or that they are material, or pertinent, or competent.

Mr. Foster: Would you stipulate that the inquiry was written and the reply to it was written pursuant to the regular course of business of the Lane-Wells Company?

Mr. Mellin: No, I can't stipulate that. I think it was for the purpose of this trial.

Mr. Foster: Then it might be necessary to call one other witness, other than the introduction of the documentary evidence.

The Court: Mr. Mellin is willing to stipulate the letters were written?

Mr. Foster: Yes.

The Court: Then I assume they speak for themselves?

Mr. Foster: Yes.

The Court: Do you offer them?

Mr. Foster: Yes, I offer them, or the carbon copies.

Mr. Mellin: Oh, no, I object. [1265]

The Court: You have no foundation objections?

Mr. Mellin: Not that they were written. I do not concede they were written in the regular course of business.

The Court: Were they sent?

Mr. Mellin: Yes, I will stipulate they were sent.

The Court: Sent through the mails?

Mr. Mellin: Yes.

The Court: Very well. Will you hand them to the clerk?

Mr. Foster: Yes, your Honor. May I have the other?

Mr. Mellin: They are self-serving, your Honor. They relate to issues of the suit written by the defendant to itself and after the trial commenced, that is, after the suit was brought.

Mr. Foster: I offer as Defendant's Exhibit AH-1 in evidence the copy of the letter dated November 21, 1947, to John T. Gardiner. That letter was written by Mr. Lyle Dillon.

And I offer as 2 under that same exhibit AH the reply, dated November 24, 1947, to Lyle Dillon from John T. Gardiner.

The Court: Now, are you gentlemen able to stipulate as to who these gentlemen are who wrote the letters?

Mr. Mellin: Yes, sir.

Mr. Foster: They are both employees of the Lane-Wells Company.

The Court: Officers of the company? [1266]

Mr. Foster: No, they are not officers of the company.

The Court: May I see the letters?

Mr. Foster: Yes, sir.

The Court: What is the purpose of the offer, Mr. Foster, to prove the truth of the facts stated therein?

Mr. Foster: Mr. Dillon is available. The other witness is not, your Honor. Mr. Dillon is here in the court room.

The Court: The person furnishing the information, I take it, is John T. Gardiner of Tulsa?

Mr. Foster: Yes, your Honor.

The Court: I will receive the letter of November 21, 1947, from Lyle Dillon to John T. Gardiner, being the inquiry, in evidence. The objection is overruled and that is received as Defendant's Exhibit AH-1. [1267]

* * * * *

Next, your Honor, the Lane patent in suit, Plaintiffs' Exhibit 1, states in its first paragraph:

"My invention relates to gun type formation testers, and the present application is a continuation in part or division of my co-pending application for: Method and means for controlling deep well gunfire for perforating casing: Serial Number 648,049; filed Dec. 20, 1932."

I next offer in evidence as Defendant's Exhibit AJ the file wrapper and contents of the application for that patent, the parent application, and the reference is cited in it. I have offered these for inspection to Mr. Mellin.

This establishes, your Honor, that the effective filing date of the Lane patent in suit is the filing date of the application for the patent of 2,029,490, the parent case.

The Court: It will be received in evidence as Defendant's Exhibit AJ.

Mr. Foster: Yes, your Honor.

The Court: I didn't quite follow you in that last remark.

Mr. Foster: The filing date of the Lane patent in suit, your Honor, is August 25, 1934, but by virtue of the fact that it is a continuation in part or division of the application for this patent, it has an effective filing date for the disclosures common to the tool of the parent case, the earlier case, which was filed December 20, 1932. [1274] So this carries back.

The Court: Were letters issued on that earlier application?

Mr. Foster: Yes, your Honor. This Exhibit AJ discloses that the letters patent are contained in it, on the back of it, and it will only require a cursory examination by your Honor of the drawings of Exhibit AJ to determine the claims in issue of the Lane patent in suit read on and describe that which is there disclosed. In other words, the disclosures of the Exhibit AJ and the patent in suit are common as regards the subject-matter of the claims in issue.

I might mention for the record also, your Honor, that an examination of Exhibit AJ will disclose that during its

prosecution in the Patent Office the defense of indefiniteness, here sometimes urged against the patents in suit, was presented by the Patent Office as to some of the application claims, and overcome by amendment and revision in the claims which were issued in the patent. Those rejections and those considerations of that highly technical objection appear at page 32 of Exhibit AJ, and while I am speaking of that subject, your Honor, the Lane patent in suit, the file wrapper of that patent, is in evidence as plaintiffs' exhibit, and on pages 14 and 18 of that file wrapper the highly technical defense of aggregation was considered, that defense sometimes being urged here by the plaintiff against this very [1275] patent.

The Court: What exhibit is that again?

Mr. Foster: That is Plaintiffs' Exhibit—

The Court: Plaintiffs' Exhibit 2?

Mr. Foster: I believe it is 2, your Honor.

I was referring to the file wrapper of the Lane patent in suit, which is Plaintiffs' Exhibit 3, your Honor.

The Court: You are referring me to pages 13 and 14?

Mr. Foster: To pages 14 and 18.

The Court: 14 and 18?

Mr. Foster: Yes, your Honor, where the subject of aggregation was considered, and likewise on page 18 this technical objection of indefiniteness is considered and overcome.

Does your Honor find it on page 14?

The Court: Yes, I have it.

Mr. Foster: Likewise on page 18 the highly technical objection of the indefiniteness was presented by the patent office with respect to some of the application claims, and

that likewise was overcome by canceling those application claims. [1276]

* * * * *

Next I desire to offer, your Honor, a license and cross-license agreement made between the Lane-Wells Company, the defendant here, and the McCullough Tool Company, a Nevada corporation, with a place of business in Los Angeles County, California. I have here an executed copy, or, the executed original of the agreement, bearing the corporate seal upon each of its pages, and I have shown it to plaintiffs' counsel. I have invited him, if he wishes, to confirm it as to execution by phoning any of the officers of either or both of the companies. I understand he is willing to waive proof of foundation, that is, proof of execution of the license [1277] agreement..

Mr. Mellin: That is correct.

Mr. Foster: And may I inquire through the court if he would also waive any objection to the use of a typed copy in lieu of the executed copy.

Mr. Mellin: No objection on that ground.

Mr. Foster: That is offered, then, as Defendant's Exhibit AK.

Mr. Mellin: Your Honor, I object to that. The date of that agreement is September 23, 1947, after this suit was filed; in fact, after the trial was commenced. It is a cross-license in which Lane Wells not only licenses under the two patents in suit, but two additional patents on well packers, and coming back to them is a license under a core tester patent from McCullough as a licensee. This also apparently discloses that McCullough had been using the combined gun unmolested for many years, and it is a

compromise of that for a relatively small amount of money. I don't see that it is of any probative value because of its date in this litigation, and I object to it on the ground of its being immaterial and self-serving. [1278]

The Court: How is it relevant to any issue here?

Mr. Foster: It is relevant to this extent, your Honor: It proves a recognition of the validity of the patent in suit by a competitor of the plaintiff and of the defendant.

I am glad that Mr. Mellin mentioned that two of the patents are included. They are included, your Honor, but the court will note that in the second part of section No. 1, which appears upon page 2, it provides that "McCullough shall not have the right to, and agrees that it will not, use, or knowingly sell for use, packers covered by the Renouf or Wells Licensed Patent except in combination with the devices covered by the Spencer and Lane Licensed Patents."

Only four patents were involved.

The Court: Suppose that everyone in the business—

Mr. Foster: I beg your pardon?

The Court: Suppose that everyone in the business but Johnston said, "Yes; those are good patents. We want a license on them." Would that be material here?

Mr. Foster: Yes; I think that would be quite material, your Honor.

The Court: You mean a lay opinion of validity?

Mr. Foster: Yes, your Honor.

The Court: To what issue does it go?

Mr. Foster: It goes to the validity of the issue of the patent; it goes to the technical defense laid by [1279] plaintiff here of paper patent that has been strongly urged by the plaintiff.

There are a host of decisions, your Honor, to establish the doctrine that the commercial success of the device, subject of the patent, is indicative of the validity of the patent.

The Court: There is no question about that, but is this relevant to the issue of whether or not it has been a commercial success?

Mr. Foster: Yes.

The Court: The fact that someone took a paper license on the subject of the litigation?

Mr. Foster: I think so, your Honor, because it is a recognition of validity, just as the commercial success of the sales or uses by the plaintiff would be evidence of public acquiescence and commercial success. In other words, our competitor, a hard-headed business man in this competitive field, would not take a license under an invalid patent.

The Court: Well, he might, if the defendant went to him and said, "Now, we are in litigation down here in Los Angeles with Johnston and we will give you a very good bargain on the license, if you would like it now, because we may win that suit, and if we win that case, why, the license will go up considerably. But if you take it now so [1280] that we can use the license to show commercial success, it is a bargain." Isn't there danger of that?

Mr. Foster: There might be danger but, to my mind, your Honor, that would go to the weight of this evidence, not to its admissibility.

And furthermore, this is not a license for a nominal sum. The provision is made on page 4, in section IV that the royalty shall be \$15.00 for each run if the test is made at a depth of less than 6,000 feet, and \$1.00 additional for each 1,000 feet or fraction thereof deeper

than 6,000 feet. Now, that is not an insignificant amount, your Honor, when we have the number of runs of the combined tool which Mr. Johnston here has testified to. That represents a very substantial sum.

The Court: The purpose of your offer is to show commercial success?

Mr. Foster: Commercial success.

The Court: Of the patent in suit?

Mr. Foster: I beg pardon? Yes, your Honor.

The Court: Of the patent in suit.

Mr. Foster: And a recognition of validity by others.

The Court: That second point disturbs me. Is it relevant to the issue of validity to show that people in business think it is valid?

Mr. Foster: I think so, your Honor. [1281]

The Court: Then, let us test that for a moment. would it be competent to bring in competitors and put them on the stand to say, "Mr. Jones, you are in this business? Yes. You are a competitor of the patentee? Yes. Have you looked at this patent? Yes. In your opinion is it valid or invalid?" Would he be permitted to express that?

Mr. Foster: I think not, your Honor.

The Court: Isn't that what this is?

Mr. Foster: I think it goes a bit—

The Court: In fact, it is a little weaker, isn't it? It is McCullough Tool Company, by implication, saying—not directly, but by implication—saying we believe these patents named in this license are valid.

Mr. Foster: I am sorry, I can't agree with your Honor that the cases are analogous or that this is weaker. I believe this: That a direct obligation to pay is the best possible tribute to the validity of the patent. This substantial royalty makes the cases non-analogous.

I feel, in the case of a competitor coming in and saying, "I think the patents are invalid, "is one that is much. much weaker, because it is shaded by a self-interest.

The Court: You are talking about evidence of commercial success now, or opinion as to validity?

Mr. Foster: Both. This is more than a license, your Honor; it is a tribute of a firm obtaining the obligation [1282] to pay royalty.

The Court: Yes, commercial success.

Mr. Foster: Commercial success and recognition of validity. He would not pay the royalty under invalid patents.

The Court: Do you have any precedent to the effect that licenses under a patent are evidence of validity of that patent?

Mr. Foster: I have no decisions immediately available here, our Honor. We can get them, I am sure, if your Honor desires to reserve a ruling to give me an opportunity to submit some.

The Court: Validity is not a question of fact, is it? It is a question of law?

Mr. Foster: No. But—

The Court: You do not prove a question of law by evidence, do you?

Mr. Foster: But we prove factors such as the commercial success and recognition of validity by competitors, from which the conclusion of law can be drawn.

The Court: I had laid aside for the moment commercial success.

Mr. Foster: Yes.

The Court: And now referring only to the question of validity. [1283]

Mr. Foster: Yes, your Honor.

The Court: May evidence be received on the issue of validity?

Mr. Foster: I think evidence may be received which the court will consider in reaching the legal conclusion of validity.

The Court: Yes; such as commercial success.

Mr. Foster: Yes; and such as recognition of validity by the payment of financial tribute to the patent.

Furthermore, there is another application of this evidence, I think, and that is as to the scope of the patent. In other words, if the patent has been recognized as valid by the industry, by the tribute of royalty to it, that may be considered in your Honor's consideration of the scope to be given the patent.

The Court: But doesn't that all add up to commercial success?

Mr. Foster: Perhaps it does, your Honor.

The Court: I suppose that courts are influenced on the issue of whether or not the patent embodies an invention. Courts are influenced by the opinions of peoples who are skilled in the art; but even if you say that is so pragmatically, isn't the issue still one of law?

Mr. Foster: Yes; I am sure it is, your Honor .

I will offer this as going to the issue of commercial [1284] success of the devices of the patents in suit.

Mr. Mellin: May I be heard on that point for just a moment, your Honor?

The Court: Yes.

Mr. Mellin: There is no foundation here that McCullough made anything under the patent. I have some authorities that are recognized on the point of commercial success, and I want to make certain that this court is not misled.

The Court: Would not that go to the weight of it, as Mr. Foster has just suggested?

Mr. Mellin: Your Honor, I think it would go to the admissibility.

Haggerty v. Rawlings, 14 F. (2d) 928, a decision by the Circuit Court of Appeals for the Eighth Circuit, the court said:

"We need only refer to the alleged pronounced commercial success of the Haggerty guard. That success, to be proof of anything must be confined to the exact thing disclosed by the patent."

That is the rule of *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 13 S. Ct. 850;

Johnston v. Lambert, 234 Fed. 886 (Second Circuit); *Barker v. Atwell*, 13 F. (2d) 363 (Seventh Circuit Court case). [1285]

That has been the rule, your Honor, about the commercial success. You have to go beyond just a mere license. There would have to be a showing that the device built under the license corresponded to the patent. And I think that this bare license is proof of nothing, because there is no obligation to pay anything if nothing is built, and there is no proof of anything being built. And then there is no proof that whatever was built in any manner corresponded to that disclosed in the patent.

The Court: Would not that go to the weight of it, also?

Mr. Mellin: Perhaps, your Honor. But it seems to me, even on the point of commercial success, without first showing that the device, if anything was made under the license, that it corresponded to the patent; otherwise it is proof of nothing.

The Court: Objection overruled. I will receive the agreement as Defendant's Exhibit AK for the purpose of showing commercial success of the patent in suit.

Mr. Mellin: If your Honor please, the license refers to a cross-license patent by McCullough on a gun tester, that is, the tester and a gun, which was issued some years subsequent to these patents in suit.

Now, we have raised the defense that this Lane device, as shown in the patent, and the Spencer device, are in-operative for any practical purposes, both of them. Our [1286] contention here is that the reason that this cross-license was granted (1) was to buy for \$10,000, or to avoid a lawsuit that would perhaps cost \$25,000 or \$30,000.00; and secondly, to obtain a license under a patent which might produce an operative structure so that the patent owners, it being evident that they could not produce an operative structure from their own patents, required taking a license under a much later patent, a 1942 patent, in order to produce any structure that would operate, that is, a structure which would operate as a combined gun and tester.

The Court: It seems to me that that would all go to the weight of it, if it is relevant to the issue. It is relevant to the issue whether or not the patent in suit is a commercial success. How much weight it carries is another matter.

* * * * *

Mr. Foster: There is only one other matter, your Honor. Professor Daugherty called to my attention this morning, if your Honor please, that he had not disclosed to the court that in his test with the core the hole in one [1287] end of the core was not made with the gun, but was drilled with a rotary drill; that as a result, the wall

of that hole is smooth and it is slightly tapered, that is, it is larger at the end of the core than it is at the inner end of the bore by virtue of being made with a rotary drill.

If the court desires to do so, he is here to confirm that statement, but he wanted the disclosure to be fully made in that regard.

The Court: Will it be stipulated?

Mr. Mellin: Yes, sir.

The Court: That Professor Daugherty may be deemed to have so testified?

Mr. Mellin: Yes, your Honor. [1288]

* * * * *

M. O. JOHNSTON,

recalled as a witness by plaintiff in rebuttal, having been previously sworn, was examined and testified as follows:

* * * * *

Direct Examination [1292]

By Mr. Mellin:

* * * * *

Q. And at the time of these negotiations that you had with respect to a license, Mr. Johnston, under Lane-Wells' patents were you aware at that time that the patent, the Lane patent which we have been discussing here and the [1296] Spencer patent which we have been discussing here, might have been interpreted to include add-

(Testimony of M. O. Johnston)

ing a gun to your own tester? The Lane patent and the Spencer patent in suit; do you understand the question?

The Witness: I don't believe I do.

Mr. Mellin: Would you read it to him? If the court please, may the reporter read him that question?

(Question read by the reporter.) [1297]

A. Well, not at that time, no.

Q. You were aware of the patents, or did you recall them?

A. I was aware of the patents, but I didn't pay any attention to them.

Mr. Mellin: That is all.

Cross Examination

By Mr. Foster:

Q. In those negotiations, Mr. Johnston, you never asked or sought for a license to operate the gun perforators alone; you were seeking only a license to operate the combined tool, that is, a gun perforator combined with a formation tester; that is true, isn't it?

A. That is true, yes, sir. [1298]

* * * * *

NORRIS JOHNSTON,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Norris Johnston.

The Clerk: Be seated, please.

By Mr. Mellin:

Q. Would you give your full name and your residence?

A. Norris Johnston, 423-1/2 North Painter Avenue, in Whittier.

Q. And what is your age? A. Forty-five.

Q. Are you any relation to the M. O. Johnston who is [1327] here in the court room?

A. Not to my knowledge.

Q. What is your occupation?

A. I am a physicist, and at the present time general manager of Petroleum Engineering Associates, which is a consulting engineering firm handling problems connected with the production of oil.

Q. What has been your formal education?

A. I attended the University of Minnesota for two years, from 1919 to 1921, taking physics, mathematics, chemistry, and other scientific courses; then three years more at the Massachusetts Institute of Technology in Cambridge, studying electrochemistry, chemistry, chemical engineering, electrical engineering, and physics, mainly. That finished my work for a Bachelor's degree in electrochemistry in 1924. Then I spent one further year to obtain a Master's degree at the Massachusetts Institute

(Testimony of Norris Johnston)

in 1925, in physics. Subsequent to spending one year as a research engineer with the Carborundum Company in 1925, I attended the California Institute of Technology in Pasadena for two and a half years, starting in September, 1926 and finishing in February, 1929, to obtain a Doctor's degree in physics.

Q. What has been, and the extent of it, your practical experience in connection with oil production or oil-producing formations? [1328]

A. Immediately on leaving the California Institute, I was hired by the Union Oil Company of California at Wilmington, for the purpose of designing, constructing, testing and helping with the use of sub-surface instruments. The main job there was a survey instrument to record and indicate at the surface immediately on operation conditions in the well. We also worked with other devices for determining liquid levels, and so on.

Q. I also understand you were employed by the Union Oil Company. When, and over what period?

A. That was with the Union Oil Company.

Q. I beg your pardon. I mean the General Petroleum Corporation.

A. Yes. Subsequent to working with the Union Oil Company, I left them in May, 1931 and spent six and one-half years in charge of the physics research of the Firestone Tire & Rubber Company in Akron, Ohio. Subsequent to that I have spent ten years with the General Petroleum Corporation, where I was in the production engineering department, in charge of production research and core analysis, and had, you might say, consulting work on a lot of the physical problems connected with both drilling and production.

(Testimony of Norris Johnston)

Q. In that work did you make any tests or supervise any tests with respect to the permeability and porosity of sub-surface strata? [1329]

A. Yes.

Q. And, in particular, shale? A. Yes.

Q. Now, just briefly, will you tell us what shale is?

A. Shale is the end result of a sediment of rather fine particle siliceous material, which subsequent to sedimentation is overlain by other sediments and is compressed into a hard, solid rock body. It has physical properties of a solid rock. Sometimes a shale will be hydratable, but it is still hard and impermeable prior to hydration.

Q. By "impermeable" you mean to water?

A. Impermeable to any fluid.

Q. Now, it is my understanding that overlaying an oil reservoir in the earth is either a strata of impermeable shale or shell; is that correct?

A. Yes, normally. I would say practically always a commercial accumulation of oil or gas, hydrocarbons of any sort, is overlain by such an impermeable stratum, because if there were vertical permeability above a given point the accumulation would not remain there, but somewhere higher up in the structure.

Q. In other words, that cap rock, as it is sometimes called, acts as a cover to the oil pool, and if it were not impermeable, the oil would pass up through the shale to a higher level, due to the difference in weight? [1330]

A. Yes. The commercial accumulation of oil is a matter of gravitational segregation. The oil may be formed at any one of several levels, but it migrates under the force, due to the difference in specific gravity between

(Testimony of Norris Johnston)

the saline waters which occur throughout the crust of the earth and the oil and gas itself.

Q. Did you say you made some tests concerning the permeability of shale? A. Yes.

Q. And I am speaking of unfractured shale.

A. Yes, sir.

Q. Such as would cover a commercial oil pool?

A. Yes, sir.

Q. What did you find with respect to the permeability or the ability of water to penetrate or invade into shale, let us say, under a pressure of hydrostatic head of 5,000 feet or 10,000 feet, that is, approximately 5,000 pounds per square inch, and with an ordinary drilling mud in contact therewith, under that pressure what would you say the permeability of that shale would be?

A. Permeability is a measure of a physical property of rock, and insofar as the rock is not deformed by the pressure applied to it, it is an invariant with the pressure. However, regardless of the exact conditions which you have mentioned, the permeability of all the shales I have ever tested has been [1331] a small fraction of one millidarcy. Would the court wish a definition of a millidarcy?

Q. I don't think we will need it, Doctor. Now, assuming that you have such a shale body, with a drilling fluid under the hydrostatic head in contact with it, say, after a period of 24 hours, would the amount of water which would penetrate that shale be measurable or immeasurable?

A. With highly precise laboratory apparatus it might be measurable. In an oil well it would be immeasurable.

Q. If you had a shale body of the type you have spoken of, which would form the cover for a commercial oil pool, and you shot four bullets into it to the extent of

(Testimony of Norris Johnston)

several feet, then subjected those holes to the pressure of mud fluid, put the mud fluid in contact with it, and maintained a pressure of 5,000 pounds per square inch on it for, let us say, 24 hours, will you tell me then whether or not the amount of water which would invade that shale during that period would be a measurable amount or not?

A. If the shale were sufficiently competent to form a cap rock over an oil reservoir, the amount of water entering through four bullet holes, even though several feet deep, in an oil well would not be measurable, no.

Q. Now, Dr. Johnston, isn't that the point—that shale body or shell body, by the way, would there be any difference in your answer if I had said hard shell forming a [1332] cover over a commercial oil pool?

A. No, sir, hard shell is also impermeable.

Q. Now, isn't it at that point which they cement off the casing in ordinary practice, to prevent the migration of waters up and down the casing from below this body of shale to above, to the sands above that thickness of shale?

Mr. Foster: That is objected to. The testimony of the witness is not such as to show that the witness is qualified to answer that question. He has testified to no field experience. Apparently his experience is limited to laboratory experience.

Q. By Mr. Mellin: You are familiar with that problem, are you? A. Yes, sir.

The Court: Do you urge your objection?

Mr. Foster: That is right, your Honor.

The Court: Yes. Lay a further foundation.

(Testimony of Norris Johnston)

Q. By Mr. Mellin: Dr. Johnston, are you familiar with the practice of cementing oil wells?

A. I have not been in charge of such operations, but I am pretty familiar with them, yes.

Q. As a matter of fact, in your engineering experience, petroleum engineering experience, you know the usual practices and are aware of the usual practices concerning points of cementing off well casing to prevent the migration of waters? [1333]

A. Yes, sir.

Q. And the direction, to some extent of the drilling of the well, and the problem of producing from a well are some of the problems with which you have been concerned?

A. Yes, sir.

The Court: Is there objection?

Mr. Foster: Not to that question, but I have objection to a repetition of the question I previously objected to.

Q. My Mr. Mellin: Now, Dr. Johnston, isn't it a common practice, if you know, and assumed to be correct practice by petroleum engineers, to cement the casing in that body of shale which overlies the commercial pool? [1334]

Mr. Foster: I have the same objection, your Honor, that so far as appears from the testimony of the witness, what he knows about the problems and the practice in the field is brought to him by the operators or laboratories and he is consulted as physicist.

The Court: The question, as I understand it, is not what is done, but what a prudent operator should do; is that it?

Mr. Mellin: That is right.

(Testimony of Norris Johnston)

Mr. Foster: He is not a petroleum engineer. He is not qualified by practice, nor, so far as his testimony goes, by operations, as to what a prudent petroleum operator would do. He is not a petroleum engineer; he is a physicist.

The Court: Is there any way of knowing what is a petroleum engineer?

Mr. Foster: I think so.

Mr. Mellin: What about Dr. Petty?

The Court: Are there degrees of petroleum engineers?

Mr. Foster: No, your Honor. But I think those who have for years supervised the handling of wells and production of oil, rather than a physicist, are the ones who are qualified to answer this question.

The Court: That might go to the weight of his opinion. Objection overruled. You may answer. [1335]

Mr. Mellin: Do you have the question in mind, Doctor?

A. I believe so. It is the common practice to use the cap rock to roof over an oil reservoir or gas reservoir, along with the pipe structure to the surface, if the two are fastened together securely, as a means for keeping the oil and gas under control so it may be produced commercially through the well bore. So that, ordinarily, the casing which is used to exclude other fluids not wanted is cemented into the competent shale or shell immediately overlying the oil reservoir by the process of cementing with a slurry of cement.

Q. Doctor Johnston, in your work you advise operators to the point of whether or not a certain formation is the proper formation within which to cement the pipe?

A. I have so advised; yes, sir.

(Testimony of Norris Johnston)

Q. Would you advise a prudent operator to shoot for water shutoff test in any shale or shell formation which was not impermeable?

A. No; I would not so advise.

Q. That is all—just one moment. There is such a thing as fractured shale, isn't there, Doctor?

A. Yes.

Q. If the fractures in the shale extend completely through the thickness of the shale so that there is a passage from the upper side of it, was in an oil sand, [1336] to the lower side of it, was in an oil sand, would a prudent operator set his pipe and cement in that shale to effect a water shutoff, or could there be such a shale?

A. Yes; such a shale could exist, but it would not normally form the cap rock over an oil reservoir, because if there were permeability through the shale, the reservoir would not exist at that point, but at some higher or shallower level. Consequently—

Q. I see. So, then, as a matter of fact, Doctor, the shale ordinarily overlying oil-bearing sand having commercial possibilities, I mean commercial quantity of oil in the reservoir, that you could say for all practical purposes that that sand is impermeable, or that shale is impermeable?

A. Yes; it would not be fractured so extensively as to be considered anything but impermeable.

Q. If it is fractured partly but it does not extend to the boundaries, and you cement the casing in that shell,

(Testimony of Norris Johnston)

what happens to the crevices or the cracks at a cementing operation?

A. Well, they would be filled with the cement slurry if they were large enough to take any appreciable amount of fluid, or with the filtrate from the cement slurry if they were not large enough to take the particles of cement themselves. [1337]

Q. And therefore, would they offer any reservoir for water from the mud cake or from the mud fluid which might be put in contact with that formation under pressure?

A. No; they would not.

Mr. Mellin: That is all.

Cross Examination

By Mr. Foster:

Q. Dr. Johnston, if after cementing off in this shale body a perforation is made and a sample is taken and water is secured, where does the water come from?

A. Do you mean a considerable amount of water?

Q. Yes.

A. I would come to the conclusion that the cement job was not satisfactory and that the cement had probably channeled around the pipe, rather than forming a complete ring cementing the pipe firmly into the shale. That is the purpose of the water shutoff test.

Q. The water would be coming not from the shale, but from the sand body above or below it, is that true?

A. That is correct.

(Testimony of Norris Johnston)

Q. And it is possible the water may have come through any cracks that were in the shale?

A. That is correct, providing such fractures were of considerable extent and reached to a point where a [1338] permeable zone contained water.

Q. Is it possible that the gun perforating, that is, the impact of the travel of the projectile and the shock wave might make cracks and crevices in the shale body, communicating with the sand body having water in it?

A. That is possible, but I would say that a prudent operator would not shoot into a shale body that was so thin that that could take place. If the shale body was not completely competent and impermeable and capable in itself of enclosing an oil reservoir, were a matter of inches or a foot or two in thickness, I would say that most prudent operators would not try to shoot into that but would set their pipe, cement the pipe, and drill through and test the oil formation below to see whether the cement job had been satisfactory, rather than trying to shoot into the shale itself to see whether the job had been satisfactory.

Q. From your experience in the many tests you have made with shales to determine their principal properties, it indicates clearly to you, does it, Doctor, that a shock or disturbance such as that of the travel of the gun perforator and the explosion of a gun perforator bullet in the explosion of the powder charge could very well cause cracks and crevices in a shale body adjacent the path of travel of the projectile? [1339]

A. Shale is a compactable material in the early stages of its life, and it never loses completely its slight degree of resilience; it does eventually become a fairly hard rock,

(Testimony of Norris Johnston)

but it is composed of very fine particles and is slightly resilient, in differentiation from a sandstone or very hard sandstone known as shell which is definitely a brittle, crystalline material. Consequently, I would say that fracturing in a shale could exist, but would probably not be very extensive.

Q. It would be more likely to exist and more extensive in a sand formation?

A. Not in the sand formations, particularly the softer ones, but a hard cemented sand formation into which one would shoot for a water shutoff test, I would think the fractures might exist further in the sandstone.

Q. You have made tests of cores in the productive formation zones, haven't you?

A. Core analysis tests?

Q. Yes. A. Yes.

Q. And from your intimate knowledge of these cores, isn't it your opinion that when a gun perforator fires a projectile that cracks and crevices can be developed adjacent to the path of the travel of the projectile?

A. I have not made laboratory tests on the material [1340] immediately surrounding a gun perforator hole. I doubt if anyone else has.

Q. But, from your knowledge, I say, of the physical properties of such cores on productive formations, oil productive formations, you would conclude the fact that such cracks and crevices would occur?

A. Yes; such fractures should exist, from the knowledge of the physical properties and of the forces present. But I would say that, in general, they would be separations of the material without—that is, they would be a

(Testimony of Norris Johnston)

disconnection of adjacent parts of the material, without on open hole or fissure appearing.

Q. What, in your opinion, with respect to any of the oil production cores which you have worked with, is the maximum width to which such cracks or fissures could be developed with a gun perforator?

A. You are speaking of the width of the separation of the two sides of the fracture?

Q. Yes. A. Not the length of travel?

Q. That is true.

A. Considering that the material is under an overburden pressure in the well, I would repeat, as I said before, that a fracture which did occur would be of microscopic width, that is, a mere disconnection of the [1341] material, without an opening appearing, as in glass you can have a crack some distance in glass without any space appearing in the glass. It is merely a disconnection of the material.

Q. What, in your opinion, from your experience, is the maximum length of such cracks?

A. Well, that is getting very conjectural, Mr. Foster. I don't know. I would say very few inches.

Q. From your knowledge of such cores in oil productive formations would you say that the firing of a projectile from a gun perforator into them would cause such a disturbance as to facilitate, make greater, the flow of fluids from the formation into the casing?

A. Greater than what, Mr. Foster?

Q. Greater than would be the case if we merely cut through the casing and the cement and the mud cake

(Testimony of Norris Johnston)

adjacent thereto and took the formation fluids from the walls of the hole?

A. There is a greater area of exposure, a drainage area, you might say, which could increase the take of fluid from the formation into the well.

The Court: You mean when there is perforation by gun fire?

The Witness: Yes. The further that bullet penetrates, the more fractures which are caused by that shock. [1342]

Q. By Mr. Foster: You are the Mr. Norris Johnston who wrote an article entitled "Core-Analysis Interpretation," are you not? A. Yes, sir.

Q. I note that on page 1 of that article, in the middle of the paragraph under "Porosity," you state with respect to pores: "Some of them are not connected at all, but are sealed off hermetically, and represent 'isolated porosity.'" Would you not expect the gun perforation into a productive formation to link up some of the sealed-off pores, and hence increase the productivity by virtue of the perforation?

A. Sealed-off pores would be connected to the extent, after perforation by the gun bullet or bullet, by the fracture, if any, surrounding such bullet hole. But the amount of fluid available in a sealed pore is all that that pore can contribute to the flow into the well and therefore is not of great consequence. A pore is of consequence in allowing production into the well only insofar as, besides adding its microscopic quantity of oil, acts as a part of a long channel into the well from below other pores.

(Testimony of Norris Johnston)

Q. In general, in this paper you point out, do you not, that the formation of a mud cake in the taking of a core obscures the results or masks them to some extent, that is, obscures or masks a determination of the [1343] productivity of that zone?

A. There has been a great deal of controversy among the petroleum engineers as to how much the productivity of—a zone in production, you are saying now, that is, in the production of the oil well, not during a formation test. I have had no direct engineering experience with the testing of samples of sand immediately adjacent to a formation test. I have been in connection with tests of the productivity of oil wells for several years. And there has been a great deal of controversy as to how much the productivity of a well is diminished by the presence of the mud cake; but there is general acceptance of the fact that the mud cake itself to some extent decreases the permeability of the—correction, please—decreases the productivity of the zone into which either gun perforations or some other type of opening into the well are produced.

Q. And is it also generally accepted that the impediment to the flow of the formation fluids into the well afforded by the presence of fresh water likewise decreases the productivity of the well?

A. Yes; that is accepted.

Q. And both those factors are generally accepted, and accepted by you, as some of the explanations why it is impossible to correctly correlate the laboratory determination of the permeability of the formation with the

(Testimony of Norris Johnston)

productivity [1344] of the formation, measured in barrels per day per pound drop per foot of sand?

A. That is correct. It is very seldom that an oil well produces its full theoretical amount or rate of production of oil based on core analysis alone.

Q. And a third such factor affecting the same thing is a mud intrusion into the sands?

A. To some slight and unknown extent that is also true.

Q. And another like factor with the same effect is the swelling of clay particles by contact with fresh water?

A. That is true. [1345]

* * * * *

Mr. Foster: One moment. A point was raised this morning that there was no evidence as to the payment of any amounts pursuant to the license agreement between Lane-Wells and McCullough Tool.

The Court: Are you referring to Defendant's Exhibit AK?

Mr. Foster: To Defendant's Exhibit AK, yes, your Honor. I have a witness in court whom I will produce, unless Mr. Mellin is willing to accept this stipulation: That the witness is Mr. Ingle from the comptroller's office of the Lane-Wells Company, defendant here; and in [1425] the regular performance of his duties he receives remittances such as remittances from the McCullough Tool Company; that he did receive, shortly after the date which it bears, a royalty statement; it was received on November 26, 1947, a royalty statement dated November 24, 1947, from McCullough Tool Com-

pany, and accompanying it a check which was No. 10776 from the McCullough Tool Company for \$650, the amount of royalties shown by the statement to be due for the month of October, 1947.

And I show to counsel the original of the letter from McCullough Tool, or report, and the voucher stub which accompanied the check.

If Mr. Mellin is willing to stipulate that Mr. Ingle, for all purposes of this trial, may be deemed to have so agreed and testified, I believe that is all.

Mr. Mellin: I will stipulate that he would so testify, your Honor, but I do not waive objection as to materiality.

The Court: Very well. That is offered for the purpose of proving commercial success, I take it?

Mr. Foster: Yes, your Honor. May the stipulation be accepted by the court, your Honor?

The Court: The objection heretofore made to the admission of Defendant's Exhibit AK will be deemed to have been made to the admission of this evidence to which you [1426] have stipulated.

Mr. Mellin: Yes, your Honor.

The Court: With respect to the payment by McCullough Tool Company, and the witness will be deemed, pursuant to the stipulation, to have so testified.

Mr. Foster: Thank you, your Honor. And may I offer into evidence as Defendant's Exhibit AM-1 the report dated November 24, 1947; and as Defendant's Exhibit AM-2, the voucher stub No. 10776 which accompanied the check, and ask leave of the court, and through the court, permission of Mr. Mellin, to substitute photo-

stats of these after they have been marked by the clerk. These are our only copies.

Mr. Mellin: I have no objection to copies if it is admissible at all.

The Court: The McCullough Tool Company royalty report, is that what it is?

Mr. Foster: Yes, your Honor.

The Court: And the voucher stub.

Mr. Foster: No. 10776.

The Court: You make the same objection?

Mr. Mellin: Yes, your Honor, as I did to the license agreement.

The Court: To Defendant's Exhibit AK. That objection likewise will be overruled and the documents received into evidence as Defendant's Exhibits AM-1 and 2. [1427]

Mr. Mellin: If your Honor please, through the court, may I ask Mr. Foster if he will stipulate that if that same witness were asked, he will testify that this is the first royalty payment they ever received on the license agreement?

The Court: I take it that it will be stipulated?

Mr. Foster: Is that right? Pardon me, your Honor. That is so.

The Court: It is stipulated, then, as I understand it, that this payment from McCullough Tool Company in November of this year is the first royalty.

Mr. Mellin: Ever received on the patents, either of the patents in suit.

The Court: Is that the stipulation?

Mr. Foster: Yes; that is the stipulation.

The Court: Either the Lane or the Spencer patent.

Mr. Foster: Yes; I will so stipulate, your Honor. [1428]

* * * * *

Mr. Foster: There is only one other thing, your Honor. The court indicated that perhaps by the end of the trial we would be able to stipulate as to the validity of the Leur (?) patent under which the plaintiff is licensed and the O'Neill patent, licensed by Mr. Johnston, pertaining to the two claims that I read here. I have had no indication from Mr. Mellin: Is he prepared? [1433]

* * * * *

The Court: The arguments have been most helpful to me. I want to commend counsel on both sides on their manner of presentation. The expert witnesses' opinions have been most interesting and equally helpful.

I find that the Lane patent describes a combination that is new and useful.

I am most doubtful whether the claimed invention involves more than a mere aggregation of old elements which produce a result not different in kind from that produced by using the tools separately.

I am also doubtful whether, in effecting the combination of the perforator and tester, more than the

ingenuity involved in the work of a mechanic skilled in the [1615] art is called into play.

The Patent Office has found invention in the Lane patent. The presumption is in favor of validity, and precedent directs me, in a doubtful case, to resolve the doubt in favor of validity.

So I find that the combination claimed by Lane embodies invention.

We pass from that to precisely what are the limits of the invention claimed. Congress requires the applicant for the monopoly of a patent to make a distinct and specific statement of what he claims to be new and to be his invention.

It was that want of definiteness and specificity in the Halliburton case that led to the Walker patent there being declared invalid, of course.

It is a close case, in my mind, whether this Lane patent should not be declared invalid upon the same grounds. There, again, I will resolve the doubt in favor of validity and hold that the patent is valid.

Then we come to the question of infringement. It is my opinion, in view of the fact that the claims made are very indefinite and very broad, and the fact that no device disclosed in the patent has ever been put to use, that the claims should be limited in their breadth to the precise device shown in the Lane patent. I therefore find that the [1616] Johnston device does not infringe any of the claims of the Lane patent.

With respect to the Spencer patent, it is my view, assuming validity of Lane, that Spencer's contribution was nothing more than a normal development of an old art; and that what he did rises to no greater dignity than the bringing together of a mere aggregation of old elements.

It seems to me, also, that no more ingenuity was involved there than the work of a mechanic skilled in the art, and I so find.

Accordingly, findings and judgment are ordered in favor of the plaintiff, and counsel for the plaintiff will prepare and submit proposed findings of fact, conclusions of law, and decree pursuant to the Rule, within 10 days.

[Endorsed]: Filed May 18, 1948. Edmund L. Smith, Clerk. [1617]

[Endorsed]: No. 11965. United States Court of Appeals for the Ninth Circuit. Lane-Wells Company, a corporation, Appellant, vs. M. O. Johnston Oil Field Service Corporation, Appellee. M. O. Johnston Oil Field Service Corporation, Appellant, vs. Lane-Wells Company, a corporation, Appellee. Transcript of Record. Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed July 2, 1948.

PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the
Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 11965

LANE-WELLS COMPANY, a corporation,
Appellant and Cross-Appellee,
v.

M. O. JOHNSTON OIL FIELD SERVICE CORPO-
RATION, a corporation,
Appellee and Cross-Appellant.

M. O. JOHNSTON OIL FIELD SERVICE CORPO-
RATION, a corporation,
Appellee and Cross-Appellant,
v.

LANE-WELLS COMPANY, a corporation,
Appellant and Cross-Appellee.

CONCISE STATEMENT OF POINTS ON WHICH
APPELLEE AND CROSS-APPELLANT IN-
TENDS TO RELY

Now comes M. O. Johnston Oil Field Service Corpo-
ration, a corporation, Appellee and Cross-Appellant here-
in, and adopts the Concise Statement of the Points on
Which Plaintiff-Appellant Intends to Rely on Appeal,
filed in the District Court and already appearing as a
part of the record on appeal herein, as the Concise State-
ment of Points on which it intends to rely on this appeal.

HILL, MORGAN & FARRER
WILLIAM M. FARRER
MELLIN AND HANSCOM
OSCAR A. MELLIN

Attorneys for Appellee and Cross-Appellant
[Proof of Service.]

[Endorsed]: Filed Jul. 15, 1948. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION AND ORDER RE: PRINTING OF
DOCUMENTARY EXHIBITS

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the following documentary exhibits need not be printed or reproduced in the record on appeal herein but that reference may be had thereto with the same force and effect as though reproduced herein:

Plaintiff's Exhibits 3, 5, 6, 8, 9, 10, 12-A, 12-B, 12-C, 32, 33, 35, 36-A, 36-B, 37, 38-A and 38-B.

Defendant's Exhibits F-1 to F-8, inclusive, G, K, L, M, O-1, O-2, T, W, Z, AB, AD, AF, AL, Q, R, V-1, V-2, Y-1, Y-2, and 30-B-1 to 30-B-5, inclusive.

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ORDER

The foregoing stipulation is hereby approved and it is so ordered.

Dated: July 20, 1948.

FRANCIS A. GARRECHT

United States Circuit Judge

[Endorsed]: Filed Jul. 20, 1948. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

NOTICE OF ADOPTION OF STATEMENT OF
POINTS

Appellant hereby adopts as its statement of points under Rule 19(6) on its appeal the concise statement of points on appeal under Rule 75(a) appearing in the transcript of the record certified by the Clerk of the District Court and filed herein.

Dated: At Los Angeles, California, this 19th day of July, 1948.

HARRIS, KIECH, FOSTER & HARRIS
WARD D. FOSTER

By Ward D. Foster

Attorneys for Appellant

Received copy of the within Notice this 20th day of July, 1948. Hill, Morgan & Farrer D, Attorneys for Appellee.

[Endorsed]: Filed Jul. 24, 1948. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

DESIGNATION OF APPELLANT-CROSS-
APPELLEE

Appellant-Cross-Appellee, Lane-Wells Company, hereby adopts the Designation of Contents of Record on Appeal by Defendant-Appellant, filed in the District Court and already a part of the record on appeal herein, as its designation on appeal of the record to be printed.

Dated: At Los Angeles, California, this 2nd day of August, 1948.

HARRIS, KIECH, FOSTER & HARRIS
WARD D. FOSTER

By Ward D. Foster

Attorneys for Appellant-Cross-Appellee

Received copy of the within Designation this 2nd day of Aug., 1948. Mellin & Hanscom and Hill, Morgan & Farrer, William M. Farrer.

[Endorsed]: Filed Aug. 3, 1948. Paul P. O'Brien, Clerk.





